United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

186-C

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,085

F 555

REBECCA D. LAPIANA,

Appellant,

v.

PATRICIA LAPIANA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONTENTS OF JOINT APPENDIX

[Filed Jan. 4, 1965]

LAST WILL AND TESTAMENT
OF
JOSEPH LAPIANA, Sr.

IN THE NAME OF GOD, AMEN,

I, Joseph Lapiana, of Washington, District of Columbia and being of sound and disposing mind, memory and understanding, and capable of executing a valid deed or contract, considering the certainty of death and the uncertainty of the time thereof, and being desirous to settle my worldly affairs, and thereby be the better prepared to leave this world when it shall please the Almighty to call me hence, do hereby make, publish and declare this my last Will and Testament, hereby revoking and annulling all wills and testamentary dispositions heretofore made by me, in manner and form following, that is to say:

First, and principally, I commit my soul into the hands of Almighty God, and my body to the earth, to be decently buried at the discretion of my executrix hereinafter named; and my will is, that all my just debts and funeral expenses shall be paid by my executrix hereinafter named as soon after my decease as shall be convenient:

Second, I give, devise and bequeath to my beloved wife Patricia (Pat) Lapiana, all of my real and personal property, which consists of cash in bank and in Building & Loan Assns; all stocks, bonds and trust notes. All furniture and household goods, also all jewelry which I may be possessed at the time of my death. The real estate consists of the following properties to wit: 3548-Hertford Place, N.W., 3546-Hertford Place, N.W., 3542-Hertford Place, N.W., 1472-Ogden Street, N.W., 3461 14th Street, N.W., and 3409-14th Street, N.W. All the above mentioned properties are located in Washington, D.C.

Third, I hereby request that my wife set aside the sum of Five

Thousand Dollars ($5,000) which she shall receive the interest therefrom until my grandson Joseph Lapiana 3rd shall have reached the age of 18 years, at which time this money ($5,000) will be available for him for his education. In the event of his death the money will revert to my wife. I also hereby cancel the debt of $1500. which amount I advanced to my son Joseph Lapiana, Jr.

Lastly I request that the sum of $500. be paid to the Italian Catholic Church located in Dunkirk, N. Y. for Masses for the repose of my soul. It is my wish that these Masses be offered as soon as practical after my demise.

All the rest and residue of my estate, both real, personal and mixed, I give, devise, and bequeath to my None and to them and their heirs and assigns forever, share and share alike, as tenants in common.

And Lastly, I do hereby nominate, constitute and appoint my wife Patricia (Pat) Lapiana, executrix of this, my last Will and Testament, and I desire that my executrix hereinbefore named shall not be required to give bond for the faithful performance of the duties of that office.

IN TESTIMONY WHEREOF, I have set my hand and seal to this, my last Will and Testament, at Washington, D.C. this 14th day of January, in the year of our Lord one thousand nine hundred and sixty-three.

/s/ Joseph Lapiana [Seal]

Signed, Sealed, Published, and Declared, by Joseph Lapiana, the above-named testator, as and for his last Will and Testament, in our presence, and at his request, and in his presence, and in the presence of each other, we have hereunto subscribed our names as attesting witnesses.

/s/ Thomas J. Long
Residence 1359-Park Road, N. W.

/s/ Minnie L. Banks
Residence 3411 - 14th St., N. W.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Holding Probate Court

District of Columbia, to wit:

I, Arthur P. Smith, Deputy, Register of Wills for the District of Columbia, Clerk of the Probate Court, DO HEREBY CERTIFY, That the foregoing is a true copy of the original paper writing purporting to be the last will and testament of Joseph Lapiana, Sr. filed in the Office of the Register of Wills for the District of Columbia, Clerk of the Probate Court, but which, as of this date, has not been admitted to probate and record Case No. _____.

I, FURTHER CERTIFY, That I have compared said copy with the original paper in said office, and find it to be a full, true, and correct transcript thereof.

WITNESS my hand and the seal of the said Probate Court, this 12th day of January, A.D. 1965.

/s/ Arthur P. Smith
Deputy Register of Wills for the
District of Columbia, Clerk of the
Probate Court.

[Seal]

[Filed Jan. 22, 1965]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA HOLDING PROBATE COURT

IN RE ESTATE OF

JOSEPH LAPIANA, SR.
Deceased.

Administration No. 113099

PETITION FOR CAVEAT

The petition of Rebecca D. Lapiana, respectfully represents to this Honorable Court:

1. That she is a citizen of the United States, and a resident of the State of Maryland, and is of full age.

2. That she is the mother, natural guardian and next friend for the infant Joseph Lapiana 3rd.

3. That Joseph Lapiana 3rd is the grandson and heir by adoption of Joseph Lapiana, Sr., deceased.

4. That she has notice that a certain paper writing bearing date of January 14, 1963 has been filed in this Court as the Last Will and Testament of Joseph Lapiana, Sr., deceased.

5. That the said infant Joseph Lapiana 3rd's interests will be injuriously affected by the allowance of said pretended will or its admission to probate; that on his behalf she therefore and hereby contests the probate and the validity of said paper writing purporting to be the Last Will and Testimony of Joseph Lapiana, Sr., deceased, and for that purpose alleges:

FIRST: That said paper writing bearing the date January 14, 1963, is not the last will and testament of said deceased.

SECOND: That the attesting witnesses to said alleged will did not nor did any of them sign his or her name as a witness to the said alleged will at the request of and in the presence of the said Joseph Lapiana, Sr.

THIRD: That the said deceased was not, at the time of the making and subscribing of or the acknowledging by him of said paper writing, of sound mind and memory or in any respect capable of making a will.

FOURTH: That the said paper writing purporting to be the last will and testament of said deceased, was obtained and the execution thereof procured from the said Joseph Lapiana, Sr., by fraud and deceit excercised upon him by Patricia (Pat) Lapiana or by some other person or persons unknown to petitioner.

FIFTH: That the said paper writing purporting to be the last will and testament of said deceased, was obtained and the execution thereof procured from the said Joseph Lapiana, Sr. by the undue influence, duress and coercion exercised upon him by one Patricia (Pat) Lapiana or by some other person or persons unknown to petitioner.

SIXTH: That petitioner is advised that a period of at least several months will elapse before the determining of the issues to be framed upon the caveat can be had, and petitioner accordingly states that a collector should be appointed to collect, conserve and administer the assets of the estate of the deceased, pending the conclusion of this litigation.

WHEREFORE, the premises considered, the petitioner prays:

1. That process may issue from this Court requiring the parties in interest to answer the exigencies of this petition.

2. That said paper writing may be refused probate.

3. That issues may be framed to be tried by a jury to determine the facts with respect to the execution, and the validity, of the alleged will.

4. That a collector may be appointed to be charge of the assets of the estate of the deceased, to serve under bond until the determination of this caveat proceeding.

5. And for such other and further relief as to the Court may seem meet and proper.

/s/ Rebecca D. Lapiana

/s/ James M. Schuette
Attorney for petitioner

[Jurat]
[Certificate of Service]

[Filed March 9, 1965]

ANSWER TO PETITION FOR CAVEAT

Patricia Lapiana, the Executrix nominated in the Will bearing the date January 14, 1963, filed in this Court as the Last Will and Testament of Joseph Lapiana, Sr., deceased, in answer to the caveat of Rebecca D. Lapiana, says:

1. The respondent admits the allegations of Paragraph 1 of said Petition.

2. The respondent neither admits or denies the allegations of Paragraph 2 that Rebecca Lapiana is the mother, natural guardian and next friend for the infant, Joseph Lapiana, III. and demands strict proof thereof.

3. The respondent neither admits nor denies that Joseph Lapiana, III. is the grandson and heir by adoption of Joseph Lapiana, Sr., deceased, and demands strict proof thereof.

4. The respondent denies the allegation that the said paper writing bearing the date of January 14, 1963, is not the Last Will and Testament of Joseph Lapiana, Sr., deceased.

5. Answering the allegations of Paragraph 5 of said petition, the respondent states as follows:

First, the respondent denied the allegation that the said paper writing bearing the date of January 14, 1963, is not the Last Will and Testament of Joseph Lapiana, Sr.

Second; this respondent denies the allegation that the attesting witness to said will did not sign their names as witnesses thereto at the request and in the presence of the said Joseph Lapiana, Sr.

Third; the respondent denies the allegation that the said decedent was not, at the time of making and subscribing, or of the acknowledging of him by said paper writing, of sound mind and memory or in any way capable of making a will.

Fourth upon information and belief, this respondent denies the allegation that the said paper-writing, purporting to be the last will and testament of the deceased, was obtained and the execution thereof procured by fraud and deceit exercised upon him by Patricia Lapiana or by some other person or persons unknown to the petitioner.

Fifth; upon information and belief, this respondent denies the allegation that the said paper-writing was obtained and executed by said decedent under undue influence, duress and coertion, exercises over him by one Patricia Lapiana, or by some person or persons unknown to the petitioner.

6. This respondent denies that the petitioner is entitled to the appointment of a collector or the necessity thereof.

Further, answering, this respondent, upon information and belief, avers the facts to be that the said paper writing, bearing the date of January 14, 1963, is the last will and testament of Joseph Lapiana, Sr., deceased; that the time of the execution thereof, the said Joseph Lapiana, Sr., was of sound and disposing mind, and capable of executing a valid will, deed or contract; that on the date of his execution of said will, the decedent declared to the attesting witnesses that the paper writing was the last will and testament of him, the said Joseph Lapiana, Sr.; that the attesting witnesses signed their names as witnesses to the

said will at the request of the said Joseph Lapiana, Sr., and in his presence and in the presence of each other; and that the said paper writing was not executed under fraud, coertion, duress or undue influence of Patricia D. Lapiana, or any other person or persons whatsoever.

Further answering, this respondent says she is willing that the issues may be framed and tried before a jury, as by law provided, in order that the truth of the allegations of the aforesaid caveat may be determined.

[Jurat]

[Certificate of Service]

[Filed Apr. 9, 1965]

PETITION FOR PROBATE AND LETTERS TESTAMENTARY

The petition of Patricia Lapiana respectfully represents:

1. That she is a citizen of the United States and a resident of the District of Columbia, of adult age, and not under any legal disability and she makes this application as the executrix nominated in the will of the above named decedent.

2. That Joseph Lapiana, Sr., deceased, an adult citizen of the United States, domiciled in the District of Columbia, died on the 11th day of December 1964, leaving a paper in the nature of a Last Will and Testament bearing the date the 14th day of January, 1963, in which this petitioner is named as executrix, which said will is now on file in the Office of the Register of Wills for the District of Columbia; that no other paper in the nature of a testamentary disposition of the decedent's estate has been found, although search has been made, and this petitioner believes that the above mentioned paper is, in fact, the last Will and Testament of the said decedent. To the best of my knowledge and belief the testator was survived by the following persons who are his

only heirs-at-law and next of kin, namely by this petitioner, Patricia Lapiana, his widow and his grandson, Joseph Lapiana, III, the son of Joseph Lapiana, II, deceased. There are no other children or descendants of children.

3. At the time of his death, the said testator was seized of the following real estate in the District of Columbia; Lot 823 in Square 2687, improved by premises No. 3546 Hertford Place, N.W. which property petitioner estimates to be worth about $15,000.00 and which is free from encumberances; Lot 99 in Square 2836, improved by premises No. 3461 Fourteenth Street, N.W., Washington, D.C. which property petitioner estimates to be worth about $20,000.00 and which is free from encumberances; and Lot 534 in Square 2685, improved by premises No. 1472 Ogden Street, N.W., which property petitioner estimates to be worth about $12,000.00 and which is free from encumberance. The above properties are yielding gross rentals of approximately $550.00 per month.

4. The decedent left personal property consisting of two first trust notes and one second trust note which he held as a tenant in common with the petitioner. The balances totaling $42,266.50; of which amount his interest is $21,133.25; and a health and accident policy No. D48614 with the World Insurance Company.

5. The decedent left no debts, and the expenses of his last illness and funeral were $9,521.32 of which $8,556.32 has been paid by the Petitioner who demands reimbrusement thereof. The balance of $965.00 was paid by medical insurance policies.

WHEREFORE, petitioner prays:

1. That the paper in writing dated the 14th day of January, 1963, be admitted to probate and record of the last Will and Testament of the said Joseph Lapiana, Sr., deceased as a will of real property.

2. That letters testamentary issue to this petitioner as the executrix named in the will, and for such other and further relief as the na-

ture of the case may require and to this Honorable Court shall deem proper.

3. That while the Caveat which was filed on the 22nd day of January, 1965 by Rebecca D. Lapiana on behalf of Joseph Lapiana, III is pending. Patricia Lapiana who was nominated as executrix in the last Will and Testament of Joseph Lapiana, Sr., be granted letters of collection with the power to retain possession of, hold, manage, conserve, control the above said real estate, and to collect the income therefrom. [Jurat]

[Filed May 4, 1965]

ORDER APPOINTING GUARDIAN AD LITEM

It appearing to the satisfaction of the Court that Joseph Lapiana III, one of the legatees under the paper writing propounded herein as the last will and testament of Joseph Lapiana, Sr., deceased, is an infant, and is obliged by statute to have a guardian ad litem appointed in order that this matter may proceed, it is by the Court, this 4th day of May, 1965.

ORDERED, that his mother Rebecca D. Lapiana, be and she is here by appointed guardian ad litem for said infant, with authority to appear for and prosecute his interests in this cause.

/s/ Spottswood W. Robinson, III
Judge

[Filed May 12, 1965]

ORDER FRAMING ISSUES

Upon consideration of the caveat of Rebecca D. LaPiana, filed against a certain paper writing bearing the date the 14th day of January, 1963, filed herein, purporting to be the last will and testament of Joseph LaPiana, AKA Joseph LaPiana, Sr., deceased, and of the answer of Patricia (Pat) LaPiana, filed thereto, it is by the Court this 12th day of May, 1965.

ORDERED, that the following issues be and they are hereby framed to be tried before a jury on the 27th day of May, 1965:

One: Was the paper writing filed in this Court and bearing date the 14th day of January, 1963, the last will and testament of Joseph LaPiana, deceased?

Two: Was the said paper writing dated the 14th day of January, 1963, purporting to be the last will and testament of Joseph LaPiana, deceased, executed and attested in due form, as required by law?

Three: Was the said Joseph LaPiana at the time of the making and subscribing or of the acknowledging by him of the said paper writing of sound and disposing mind and memory and capable of executing a valid deed or contract?

Four: Was the said paper writing dated the 14th day of January, 1963, obtained, or the execution thereof procured from the said Joseph LaPiana, deceased, by fraud or deceit practiced upon the said Joseph LaPiana by Patricia (Pat) LaPiana or any other person or persons?

Five: Was the said paper writing dated the 14th day of January, 1963, obtained, or the execution thereof procured from the said Joseph LaPiana, deceased, by the influence or duress, or coercion of Patricia (Pat) LaPiana or any other person or persons?

Judge

[Filed May 28, 1965]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter Of:

ESTATE OF JOSEPH LAPIANA, SR.,
Deceased

Administration
No. 113099

ORDER APPOINTING COLLECTOR

Upon consideration of the prayer of the petition of Rebecca D. Lapiana filed herein on the 22d day of January, 1965, for the appointment of a collector to collect, conserve and administer the assets of the decedent pending the appointment of a personal representative for his estate, and after a hearing of the matter on May 12, 1963, at which the caveator and the caveatee were represented by counsel, and, there being a contest in relation to the document alleged to be the last will and testament of the decedent, and good cause for the appointment of a collector having been shown, it is this 28th day of May, 1965,

ORDERED that the Riggs National Bank, of Washington, D. C., be and hereby is appointed Collector for the estate of the said Joseph Lapiana, Sr., deceased, with full power and authority to take possession of, hold, manage, conserve and control all real estate that may be affected by the contested will, and all personal estate of the decedent, and to exercise all of the powers and discharge all of the duties of an administrator of said estate, including the payment of debts, until further order of the Court.

/s/ Spottswood W. Robinson, III
JUDGE

[Filed July 27, 1965]

ORDER FIXING TRIAL DATE

The above case having been pretried this date, now, therefore, it is, by the Court, this 27th day of July, 1965,

ORDERED that Monday, November 8, 1965, be and it is hereby fixed as the date for trial on the merits of the issues heretofore framed by order of May 12, 1965.

/s/ Luther Youngdahl
JUDGE

[Filed February 10, 1966]

PLAINTIFF'S EXHIBIT 1

IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA
DOMESTIC RELATIONS BRANCH

Ex parte in the matter of the

Petition of:

JOSEPH LAPIANA, JR., and
REBECCA D. LAPIANA, his wife,

Adoption No. A 626-61

for Adoption.

INTERLOCUTORY DECREE FOR ADOPTION

Upon consideration of the petition of Joseph Lapiana, Jr., and Rebecca D. Lapiana, his wife, filed herein on the 6th day of December, 1961, for the adoption by them of a male infant, born on the 15th day of November, 1961, District of Columbia, and it appearing to the Court that the petitioners have had custody of said adoptee since the 18th day

of November, 1961, and that it further appearing to the Court that the adoptee is physically, mentally and otherwise suitable for adoption by petitioners, that the petitioners are fit and able to give the adoptee a proper home and education and that it is in the best interest of the adoptee that the petition be granted, it is by the Court this 1st day of May, 1962,

ORDERED, that an interlocutory decree of adoption is hereby entered establishing the relationship of parent and child between Joseph Lapiana, Jr., and Rebecca D. Lapiana, adoptors, and the male infant herein, adoptee, provided that this decree shall automatically become final on the 1st day of November, 1962, unless set aside for good cause on or before that date, and it is

FURTHER ORDERED that the said adoptee shall henceforth be known as Joseph Lapiana, III, and it is

FURTHER ORDERED that the clerk is hereby authorized to furnish a certified copy of this decree to the adoptors or their attorney.

/s/ Harry L. Walker
JUDGE

PLAINTIFF'S EXHIBIT 2

[Filed February 10, 1966]

ANTENUPTIAL AGREEMENT

Whereas, Joseph Lapiana, of the City of Washington, District of Columbia, and Patricia Valvo, of the city of Silver Creek, County of Chautauqua, State of New York, contemplate entering into a marriage relation; and whereas Joseph Lapiana has an estate and a son, Joseph Lapiana, Jr., by a previous marriage; and whereas, said Patricia Valvo is possessed of property in her own right; and whereas, the said parties to this contract desire to prescribe, limit and determine the interest and control which each of the parties may have in the estate of

also known as Patrina Valvo P.V. ok

the other party, should the aforesaid marriage relations be terminated by death or legal proceedings: Therefore the following contract and agreement is entered into:

KNOW ALL MEN BY THESE PRESENTS: That we, Joseph Lapiana of the City of Washington, District of Columbia, and Patricia Valvo, of the City of Silver Creek, County of Chautauqua, State of New York, being about to enter into the marriage relations, do hereby agree each one with the other one:

1. That in the event of the death of the said Patricia Valvo during the continuance of said marriage relations, said Joseph Lapiana, surviving her, then Joseph Lapiana shall receive from the estate of said Patricia Valvo the sum of five dollars ($5.00); such sum when paid by the executors or administrators of the estate of said Patricia Valvo to be in full for all claims and demands of every kind and character which the said Joseph Lapiana shall have against the estate of said Patricia Valvo, same to cover all rights of curtesy, dower, statutory right, all allowances for support, and all right of inheritance, the entire interest of said Joseph Lapiana in the estate of said Patricia Valvo to be limited to the said claim of five dollars ($5.00). The specific enumeration in the foregoing paragraph is not to limit the general clause herein.

2. In consideration of the terms and conditions of this contract, it is agreed that, should Patricia Valvo survive said Joseph Lapiana and should Joseph Lapiana die during the existence of the marriage relations between the parties hereto, the said Patricia Valvo agrees for herself that her claim upon the estate of Joseph Lapiana shall be limited to twenty thousand dollars ($20,000.00), and a payment by the executors or administrators of the estate of said Joseph Lapiana to the said Patricia Valvo, or her legal representative, of the sum of twenty thousand dollars ($20,000.00) shall be in full for all claims and demands of every kind and character which the said Patricia Valvo shall be entitled to as the wife or widow of said Joseph Lapiana against his said estate.

This payment to be a satisfaction of all claims for dower, statutory right, right of support, right of inheritance, and homestead right, and every claim of every kind or character. The specific enumeration herein is not to limit the general terms herein used.

3. The purpose and intend of this agreement is to fully, perfectly and completely define and limit the claims and demands which each of the parties to this contract shall have against the estate of the other. Should either party die during the pendency of this contract, or should the contract be determined by legal proceedings, the claims herein stipulated and defined shall be the limit which either party may have against the estate of the party so dying, or the contract being terminated as above specified during the continuance of the marriage contract.

4. This agreement is made and entered into with full knowledge upon the part of the parties hereto that each of the parties has a separate estate, and no claim or demand can be predicated upon the fact that there has been any misrepresentation or concealment as to the amount and condition of said separate estate, it being expressly agreed and understood that each of the parties at this time consider the amount herein above fixed to be sufficient participation in the estate of the other and I, Patricia Valvo, consider the provisions herein made for me sufficient for my support and maintenance; each of said parties stating that they have a sufficient general knowledge of the condition of the estate of the other to justify them in making and entering into this agreement.

In witness whereof the parties hereto have put their hand and seals to these presents this 18th day of November, 1958.

/s/ Patricia Valvo (SEAL)
also known as Patricia Valvo

/s/ Joseph Lapiana (SEAL)

Will—Short Form. 558A David F. Williamson Co., Publishers, 42 Niagara St., Buffalo, N. Y.

PLAINTIFF'S EXHIBIT 3

Last Will and Testament

I, Elizabeth Valos of the Village of Silver Creek, in the County of Chautauqua and State of New York, being of sound mind and memory, do make, publish and declare this my last **Will and Testament**, in manner following, that is to say:

First. I direct that all my just debts and funeral expenses be paid.

Second. I give, devise and bequeath all of my property, both real + personal to my daughter, Patrina Valos, absolutely and forever.

FILED

FEB 10 1956

THEODORE COGSWELL
REGISTER OF WILLS, D. C.
Clerk of the Probate Court

Lastly, I hereby appoint Patrina Valos executrix of this, my last Will and Testament, with full power and authority to sell and convey, lease or mortgage real estate; hereby revoking all former wills by me made.

In Witness Whereof, I have hereunto subscribed my name the 6th day of August in the year One thousand nine hundred and fifty-one

Witness to Mark
Samuel Printers
Carl D. Menster

Elizabeth her + mark Valos

STRICKEN

BY ORDER OF COURT of Feb. 8, 1967

We, whose names are hereto subscribed Do Certify that on the 6th day of August 1951, Elizabeth Valvo the testatrix, subscribed her name to this instrument in our presence and in the presence of each of us, and at the same time, in our presence and hearing, declared the same to be her last Will and Testament, and requested us and each of us, to sign our names thereto as witnesses to the execution thereof, which we hereby do in the presence of the testatrix and of each other, on the said date, and

No. 43A

STATE OF NEW YORK }
Chautauqua County } ss.

SURROGATE'S COURT

I, ROBERT LINCOLN, Clerk of the Surrogate's Court of said County, do hereby certify that I have compared the foregoing copy of THE LAST WILL AND TESTAMENT OF ELIZABETH VALVO, Deceased with the original record of the same remaining in this office, and that the same is a correct copy of said original record and the whole thereof; that the same remains unrevoked and has full force and effect at this date.

IN WITNESS WHEREOF, I have hereunto set my official hand and seal at Mayville, N. Y. this 29th day of October 1965

/Clerk of the Surrogate's Court

By
Deputy Clerk of the Surrogate's Court

: Will
lvo,
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ourt

705

47-109

Will

of

Elizabeth Valvo

Dated August 6, 195

SURROGATE'S COURT
CHAUTAUQUA COUNTY

Recorded in Liber 47

Wills, at Page 109

This 27 day of August

and Examined.

Robert Lincoln C

[Filed November 9, 1965]

1st Minute Entry — Book 337 Page 62

Tuesday, November 9, 1965
Civil Division No. Four
Judge George L. Hart, Jr., Presiding

In Re: Estate of

Joseph Lapiana,
also known as
Joseph Lapiana, Sr.,

Deceased

Administration No. 113,099

This cause coming on to be heard before a Judge holding a special term as a Probate Court for the trial of Will Contests, it is ordered that the issues heretofore framed in this cause be tried by the jury summoned and now in attendance upon Civil Division Number Four of the United States District Court for the District of Columbia; whereupon come here as well Rebecca D. Lapiana, as mother and next friend of Joseph Lapiana, III (Caveator) Plaintiff by her attorney James M. Schuette, and Patricia Lapiana (Caveatee) Defendant by her attorneys Lawrence Z. Bulman and Francis Racioppi, and a jury of good and lawful men and women of the District of Columbia, to wit:

John B. Scott	Mrs. Grace M. Cramer
Mrs. Marguerite B. Lilly	Miss Geneva G. Kuhn
Mrs. Gladys J. Goings	Mrs. Anita K. Harrod
Patrick O. Gates	Mrs. Edith P. Dawson
Clarence W. Smith	Miss Alice O. Watkins
Andrew A. Reid	Robert W. Stokley

Alternate Jurors

Matthew J. Morris

Miss Violet L. Strahl
Mrs. Mary E. Farmer
Herman Wolf

who, being duly sworn to try and true answers to make to said issues, after hearing of the evidence in part, is respited until the meeting of the Court November 10, 1965.

Docket Entries

November 9, 1965—Ordered that issues be tried by jury in attendance upon Civil Division No. Four, of the United States District Court for the District of Columbia, holding a special term as a Probate Court for the trial of Will Contests.

November 9, 1965—Jury sworn.

November 9, 1965—Witnesses for (Caveatee) Defendant 2

November 9, 1965—Jury respited until the meeting of the Court November 10, 1965.

[Filed November 15, 1965]

4th Minute Entry – Book 337 Page 144

Monday, November 15, 1965
Civil Division No. Four
Judge George L. Hart, Jr., Presiding

In Re: Estate of

Joseph Lapiana,
also known as
Joseph Lapiana, Sr.,

Deceased

Administration No. 113,099

(Caveator) Plaintiff,

v.

(Caveatee) Defendant.

Now come here again the parties aforesaid in manner aforesaid and the same jury that was respited November 12, 1965; whereupon the trial was resumed; motion of (caveatee) defendant for directed verdict at completion of (caveator) plaintiff's case, argued and granted; alternate jurors discharged; whereupon the Court re-frames issues and directs verdict in favor of the will; jury discharged. In re-framing the issues the Court eliminated original issue No. Four. (Issues as re-framed attached hereto).

1. Was Joseph Lapiana, Sr., at the time of the making and subscribing or of the acknowledging by him of the paper writing, dated January 14, 1963, of sound and disposing mind and memory and capable of executing a valid deed or contract?

ANSWER: Yes.

2. Was the said paper writing, dated the 14th day of January, 1963, obtained or the execution thereof procured from the said Joseph Lapi-

ana, Sr., by fraud or deceit, practiced upon the said Joseph Lapiana, Sr. by Patricia Lapiana or any other person or persons?

ANSWER: No.

3. Was the said paper writing, dated the 14th day of January, 1963, obtained or the execution thereof procured from the said Joseph Lapiana, Sr., by the influence or duress or coercion of Patricia Lapiana or any other person or persons?

ANSWER: No.

4. Was the paper writing filed in this Court and bearing the date 14th day of January, 1963, the Last Will and Testament of Joseph Lapiana, Sr.?

ANSWER: Yes.

Docket Entries

November 15, 1965—Issues re-framed by the Court. Issues Nos. 1 and 4 answered "Yes". Issues Nos. 2 and 3 answered "No".

November 15, 1965—Verdict sustaining will by direction of the Court.

November 15, 1965—Proceedings before Civil Division No. Four of the United States District Court for the District of Columbia, holding a special term as a Probate Court for the trial of Will Contests. Judge George L. Hart, Jr., Presiding.

/s/ Theodore Cogswell
Register of Wills for the District of Columbia, Clerk of the Probate Court.

[Filed Nov. 24, 1966]

CAVEATOR'S MOTION FOR NEW TRIAL

The plaintiff (caveator), Rebecca D. Lapiana, respectfully moves the Court to vacate its order heretofore entered directing a verdict on all issues for defendant (caveatee), and to grant her a new trial, for the following reasons:

1. The Court erred in directing a verdict for the defendant (caveatee) on the first issue: Was the paper writing filed in this Court and bearing date the 14th day of January, 1963, the last will and testament of Joseph Lapiana, deceased?

2. The Court erred in directing a verdict for the defendant (caveatee) on the second issue: Was the said paper writing dated the 14th of January, 1963, purporting to be the last will and testament of Joseph Lapiana, deceased, executed and attested in due form, as required by law?

3. The Court erred in directing a verdict for the defendant (caveatee) on the third issue: Was the said Joseph Lapiana at the time of the making and subscribing or of the acknowledging by him of the said paper writing of sound and disposing mind and memory and capable of executing a valid deed or contract?

4. The Court erred in directing a verdict for the defendant (caveatee) on the fourth issue: Was the said paper writing dated the 14th day of January, 1963, obtained, or the execution thereof procured from the said Joseph Lapiana, deceased, by fraud or deceit practiced upon the said Joseph Lapiana by Patricia (Pat) Lapiana or any other person or persons?

5. The Court erred in directing a verdict for the defendant (caveatee) on the fifth issue: Was the said paper writing dated the 14th day of January, 1963, obtained, or the execution thereof procured from the

said Joseph Lapiana, deceased, by the undue influence or duress, or coercion of Patricia (Pat) Lapiana or any other person or persons?

/s/ James M. Schuette
Attorney for Caveator

[Certificate of Service]

[Filed Nov. 30, 1965]

OPPOSITION TO
CAVEATOR'S MOTION FOR NEW TRIAL

In opposition to caveator's motion for a new trial, caveatee states as follows:

1. That the motion contains no matter with respect to which caveator was denied a full hearing in the course of trial; that caveator was denied no opportunity to fully present and develop his evidence on each issue raised by the caveat.

2. That caveator's motion fails to direct the Court's attention to any finding of fact in conclusion or law which is clearly erroneous.

WHEREFORE, as a motion for a new trial is addressed to the discretion of the trial court, and whereas caveator has failed to show error or abuse of discretion, it is respectfully submitted that caveator's motion for a new trial should be denied.

Lawrence Z. Bulman
Attorney for Caveatee
820 Woodward Building
Washington, D. C. 20005

[Certificate of Service]

[Filed Dec. 7, 1965]

ORDER

Upon consideration of the Caveator's Motion for new trial and Points and Authorities in Support thereof, and of Caveatee's opposition thereto, it is by the Court this 7th day of December, 1965,

ORDERED, that the Motion for new trial be and is hereby denied.

/s/ George L. Hart
Judge

[Certficate of Service]

[Filed Jan. 3, 1966]

NOTICE OF APPEAL

Notice is hereby given this 3rd day of January, 1966, that Rebecca D. Lapiana, caveator and plaintiff in the above styled case hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 7th day of December, 1965 in favor of Patricia Lapiana, caveatee and defendant therein against said Rebecca D. Lapiana.

/s/ James M. Schuette
Attorney for
Rebecca D. Lapiana

EXCERPTS FROM TRIAL PROCEEDINGS

Washington, D. C.
Tuesday, November 9, 1965

* * *

[11] MR. BULMAN: *** The first contention, as in the Pretrial Statement, is for a deceit allegedly against Thomas Long and Emily Bank. He failed to state any evidence or even adduce mention of the names. I think this should be, this issue, should be withdrawn from the case at this time.

THE COURT: Well, that issue is not in the case.

MR. BULMAN: It's in the pretrial statement.

THE COURT: Well, it's not in the case anymore.

Now, the two issues in the case are undue influence and testamentary capacity.

MR. SCHUETTE: And execution of the will, if Your Honor please.

THE COURT: Well, the issue of execution of the will is in it to the extent that it is always up to the proponent of the will to show due execution. If there is no issue of fraud or what not as far as the witnesses to the will are concerned. But you'd still have to prove it.

[12] MR. SCHUETTE: Your Honor, we have no direct evidence of that but may we say that we believe the circumstances are such that a jury could well infer from the circumstances that fraud was present.

THE COURT: On the part of the witnesses?

MR. SCHUETTE: Yes, sir.

* * *

[14] THOMAS J. LONG

* * *

DIRECT EXAMINATION

BY MR. BULMAN:

* * *

Q. Now, did you know the deceased, Mr. Joseph Lapiana, Sr.?

* * *

[15] A. Yes, for a period of about -- I say 15 to 18 years.

* * *

(A document was marked as Caveatee's Exhibit No. 1 for identification.)

* * *

[16] A. *** I was a witness to Mr. Lapiana's signature on this as last will and testament.

* * *

Q. And when was this done? A. January 14th, I believe, 1963.

Q. And would you tell us who was present that day? A. Well, Mrs. Banks, and there was, I believe Mr. Banks was there and somebody else in the rear of the room. However, they were not concerned or interested in what was going on up front.

Q. Now, did you see Mr. Long -- excuse me, Mr. Lapiana, Sr. -- sign this paper? A. I did.

Q. And who signed next? A. I did.

Q. And who signed last? A. Mrs. Banks.

Q. And was it -- the signing -- done in the presence of each other? [17] A. It was.

Q. Did Mr. Lapiana, Sr. say anything at this time? A. No, nothing more.

Q. Do you know if Mr. Lapiana read the will? A. He did. He read it over carefully several times.

Q. And how old was Mr. Lapiana at this time? A. I believe he was around 71 or 72. He was one year younger than I am. We were both born 1892 but his birthday was December 11 and mine was January 20th, so I had a year in front of him.

* * *

[18] CROSS EXAMINATION

BY MR. SCHUETTE:

Q. Now, did you prepare that document? A. This here? I did. I typed this will. I took it from notes.

* * *

THE WITNESS: Yes, from my -- I took notes in long hand at Mr. Lapiana's residence at Hereford Place. Then I transcribed it and typed this will in a typewriter at my home.

THE COURT: All right.

THE WITNESS: Then I had him read the will over thoroughly before—and everything was okay before he came over to the office to sign it.

BY MR. SCHUETTE:

Q. Have you ever prepared any other wills? A. I have not. No.

* * *

[20] THE COURT: Now, at the time he signed it, was Mr. Lapiana sitting at the desk?

THE WITNESS: He had a chair right by this -- yes, right at the desk.

THE COURT: And where were you and Mrs. Banks?

THE WITNESS: Standing right there watching him sign the will.

THE COURT: All right, and then after he signed it, just physically, what occurred?

THE WITNESS: After he signed it?

THE COURT: Yes.

THE WITNESS: Well, he just passed it over for Mrs. Banks and myself to sign as witnesses to his signature.

THE COURT: Was he still there when you all signed it?

[21] THE WITNESS: Yes, he was still there.

THE COURT: And was Mrs. Banks there when you signed it?

THE WITNESS: Yes, sir.

THE COURT· And were you there when she signed?

THE WITNESS: Yes, sir, I was.

* * *

[22] MINNIE L. BANKS

* * *

DIRECT EXAMINATION

BY MR. BULMAN:

* * *

Q. I show you this paper writing marked "Caveatee's Exhibit No. 1 for identification and ask you to identify this [23] signature that appears at the bottom of the page? A. Yes,this is my signature.

* * *

Q. And for what reason did you place your signature upon this paper? A. I was asked to do so by Mr. Lapiana.

Q. And what was said when he asked you to do this? A. *** He says 'I want you to sign this piece of paper. This is my will."

* * *

A. It was January 14, 1963.

Q. And where was this signing taking place? A. In my office.

Q. And that is on 14th Street? A. 3411 Fourteenth Street, Northwest.

[24] Q. And would you tell us who was present at that time? A. Mr. Long and Mr. Lapiana was at the desk.

Q. Now, who signed the will -- excuse me, the paper -- first? A. Mr. Lapiana.

Q. And then who signed second? A. Mr. Long.

Q. And then I take it you signed third? A. Yes.

Q. And was the signing done in the presence of each other? A. Yes.

* * *

[25] CROSS EXAMINATION

BY MR. SCHUETTE:

Q. Did you have an opportunity to read the will prior to your execution of it? A. No.

[26] Q. Do you have any way of identifying page 1 of that exhibit? A. I might know it when I see it but I didn't read it.

Q. I'm asking you now to look at it and tell me whether you have any way whatsoever of identifying page 1 of that exhibit? A. This looked like the instrument but I didn't read it.

Q. Do you recall how the pages of the exhibit that you signed were put together? A. No, they were just together and all I was interested in, he asked me to sign and I signed it.

Q. Can you tell us the manner in which they were put together, what physical means, the document that you signed, what were they put together with? Do you remember? A. I didn't give that too much attention.

Q. Do you recall making a deposition in my office on October 29, 1965? A. I do.

* * *

[27] Q. *** starting now on page 23.

THE COURT: All right.

BY MR. SCHUETTE:

Q. The lower third:

"Q. Were the two sheets connected together or did he have them loose in his hand?

"A. No, he didn't have them loose in his hands. He had them on the desk, they were together.

[28] "Q. What held them together, if you know?

"A. They evidently were clipped with a staple. I don't know. I mean that wasn't, you know, too important to me."

THE COURT: Well now, "did you give those answers?" is what you should say.

BY MR. SCHUETTE:

Q. Did you give those answers at that time? A. About clipping the papers?

Q. Yes. A. I'm sure I did.

Q. Did you see Mr. Lapiana read the will? A. He was looking at the will when he called me over to the desk.

Q. Did he dictate it aloud to you at that time? A. No, the papers were there when I signed.

Q. Were the contents of the will discussed in your presence? A. No.

* * *

[29] THE COURT: Do you offer the will?

MR. BULMAN: Yes, I do, Your Honor.

THE COURT: Mr. Schuette, do you have any testimony to offer with regard to the execution?

MR. SCHUETTE: I do not, Your Honor.

THE COURT: Then the Court holds that due execution of the will has been proved and will admit it in evidence.

* * *

(The document marked as Caveatee's Exhibit No. 1 for identification was received in evidence.)

* * *

[31] Wednesday, November 10, 1965

* * *

[32] REBECCA LAPIANA

* * *

DIRECT EXAMINATION

BY MR. SCHUETTE:

* * *

[33] Q. Are you the mother of Joseph Lapiana, III? A. Yes, sir.

* * *

Q. What was your husband's name? A. Joseph Lapiana, Jr.

* * *

Q. When did he die? A. January the 15th, 1963.

* * *

[35] Q. Did there come a time, Mrs. Lapiana, when you adopted a child? A. Yes, sir.

* * *

[36] THE WITNESS: *** we took possession of the child November of '61 and the adoption became final in November of '62.

* * *

Q. Was your husband an adopted child also? A. Yes, he was.

* * *

[41] Q. Would you describe his personality? A. Yes, he was a very dominating person and very forceful and also very active and --

Q. Was he a good businessman? A. No.

Q. Could he read? A. No.

Q. How do you know that he couldn't read? What -- do you recall the instances, if any, in his life? A. It was just an accepted fact that he couldn't read because we would have occasion to read things for him.

Q. Did you ever have occasion personally to read documents for him? A. No, Mr. Lapiana, Jr. always took care of that.

[42] Q. Were you present when he read documents to him? A. Yes.

* * *

[44] Q. I ask you to describe his physical condition on January 14, 1963, the date that the will in this case is alleged to have been executed.

* * *

[45] A. *** my husband was ill November of '61. My husband was ill and from that time around that time was the time that we began to see a vast change in Father's mental condition.

* * *

THE COURT: *** counsel has asked you as to a particular date which was January 14, '63, ***

THE WITNESS: At that particular time it was at a time of my husband's death and father-in-law at that time was noticeably and absolutely mentally affected by it. He was rambling in his speech, he was -- he was apparently out of touch with the realities of the situation. ***

* * *

[46] THE COURT: No, you may tell us what you saw.

THE WITNESS: It was obious to me that Mr. Lapiana was completely out of touch with reality.

BY MR. SCHUETTE:

* * *

Q. Did you notice any changes in his speech? A. Yes.

Q. What were those changes? A. He was rambling and incoherent.

* * *

Q. Of your own knowledge did he neglect his personal [47] cleanliness?

* * *

A. *** his trousers, they were -- they were not always clean.

Q. Did he behave impulsively in your presence? A. Yes.

Q. Can you give an example of that? A. Yes, he was -- he was adamant that Joe was not sick and that these doctors were just after the money and that we weren't -- this was all unnecessary what we were doing for Joe, that Joe ought to be up and back at his office where he belonged.

* * *

Q. Was he ever angry in your presence? A. Very.

[48] Q. Would you give some examples of that? A. Yes. *** during the final illness of my husband *** He was just laying in a state of *** coma more or less, and I heard this terrible altercation going on out in the bedroom, *** and I rushedinto [49] see what the trouble was and Joe's father was irate and in a rage about some money that he had loaned Joe previously, and my husband was just laying there with this fixed stare at the ceiling and this man was carrying on this terrible scene, and I asked him at the time if he wouldn't please leave, and he turned around to me and in a -- almost in a childlike gesture -- told me "But he didn't pay it back," he said.

* * *

Q. Did he show signs of irritability? A. Yes.

Q. Do you have any instances of that? A. Well, one time when Mr. Scott was out there, I was brushing my husband's teeth *** [50] he had a seizure which locked the tooth brush in my husband's mouth; and my father-in-law was there at the time and he just went into a complete rage that I should leave him alone and not to bother him, as though I was doing something that I should not have been doing.

* * *

[52] Q. Was there any indication that he was in a generally depressed state? A. Very much so.

Q. How would you describe that? A. *** Papa spent a great deal of his time crying at the time.

Q. Was he with your husband a great deal during his last illness? A. I'm trying to answer that question candidly. There were times when he was more so than others.

* * *

Q. *** a few days before he died? A. Yes.

Q. And was Mr. Lapiana, Sr. there with him? [53] A. He was at the hospital every day, both he and Pat.

Q. At that time or at any time, did Mr. Lapiana exhibit an extreme volubility, or was he quiet or how about his nature? A. He was very quiet.

* * *

Q. Did he do a lot of talking? A. No, he did not do a lot of talking. He was very quiet.

Q. Did he exhibit a high degree of mental capacity in his discussions with you; how would you characterize your discussions with him, particularly as close to the date of your husband's death as you can remember, did you have any -- A. I didn't have any long discussions with my father-in-law to be absolutely honest, at this particular time. My time was very very taken up with taking care of my husband and the

mental condition -- I'm sorry -- the attitude of irritability and so on made it uncomfortable discussing things with him, and I was very pre-occupied at the time taking care of my husband.

[54] Q. Now, during the course of his marriage to Mrs. Patricia Lapiana and up to the time that he allegedly executed the will, how would you describe Mr. Lapiana, Sr.'s relationship with Mrs. Patricia Lapiana? A. Well, it is very hard to define when the change took place. When they were first married, my father-in-law was very dominating, almost -- well, to the point where I quite frankly felt sorry for Pat on occasion and suddenly we realized -- I'm sorry, Your Honor.

Suddenly I realized that the situation had quite changed and my father-in-law was a completely different person, very docile, very amenable to any suggestions that Pat might have, and Pat was definitely the dominating influence.

* * *

Q. *** What [55] was Mr. Lapiana, Jr.'s attitude toward your newly adopted infant? A. He was extremely fond of the child.

Q. Was he -- A. Seemed to be.

Q. Was he proud of him? A. Very much so.

Q. Did he indicate that he wanted the family name to be carried on or anything of that sort? A. Never was discussed but I am sure that it was uppermost in his mind.

* * *

Q. Do you recall any specific instances when Mr. Lapiana, Sr. was playing with your little boy? A. Yes, almost daily. Pat would come and get him and take him down and he would play on the porch.

* * *

[56] CROSS EXAMINATION

BY MR. BULMAN:

* * *

[58] Q. And isn't it a fact that he would walk over to your house under his own power? A. Yes, he would walk up there.

* * *

Q. And isn't it a fact that he walked to church under his own power, or was driven by his wife? A. So far as I know.

* * *

[61] Q. Could you describe for me what you mean by "rambling"? A. I mean he would start talking about one thing and end up talking about another. You might ask him a question on one particular subject and he'd give you an answer to another subject.

* * *

[62] RUBY WINSLOW

* * *

DIRECT EXAMINATION

BY MR. SCHUETTE:

* * *

Q. When did you first meet Mr. Joseph Lapiana, Sr.? A. About 1942 or '43.

* * *

Q. How long a period did you work for him? A. Well, I would say about ten years. This was a part-time job.

Q. And in what capacity did you work for him? A. Well, I kept books at the Cavalier Restaurant when he was [63] owner and then after that he owned a store, he had part ownership in a grocery store and I took care of those. He couldn't read or write so --

* * *

Q. Are you absolutely certain of what you have just said? A. Absolutely.

Q. Why are you so sure that he couldn't read or write? A. He learned to write his name, he could do that much, but I tried to teach him reading. I was going to teach him and Mrs. Lapiana reading but she soon became disinterested so I dropped it.

Q. Which Mrs. Lapiana? A. Mrs. Lapiana, Sr., the first Mrs. Lapiana.

Q. And were you successful in teaching Mr. Lapiana, Sr., how to read? A. No, because I only had started it and was just a few days.

Q. And as you sit there you are absolutely certain that man could not read, is that correct? [64] A. Yes.

THE COURT: When couldn't he read? I mean by that, at what date did you know he couldn't read, what was the latest date you knew he couldn't read?

THE WITNESS: Well, it was some times after 1949, because I say this time because I bought a house in 1949 but -- on Ogden Street in Washington which is near where he lived, and it was a few years after that.

* * *

Q. Did you see him on or about the time that his son died? A. Yes.

Q. Can you describe that meeting? A. Well, I went to the funeral home when his son was [65] there and I thought he acted a little strange,* * *

* * *

A. Well, he was crying. During the conversation he cried and he said to me, "Joe is dead."

Q. Where was he when this conversation was taking place? A. We were up near the casket looking at the flowers.

* * *

Q. Now do you have a specific recollection of what occurred as you were talking to him at the casket of his son, and can you tell — A. Yes, I do, because I thought he acted strange.

Q. What happened? A. Well, his sentences were incoherent – they were not coherent. I tried to take his mind off of his son, you know, and talk about other things, but he would go back to Joe, Jr., [66] and he said — one time he said "I wish I was dead," and I told him, I said "Well, I'm surprised at you. You have so many friends, why would you want to die?"

And he said "No, I don't."

And I said "You do. You have me. You have Pat, your wife."

And he says "Oh, Pat don't care anything for me," and I said "Well why do you say that?"

He says "Well, she only married me because she thought I had a little bit of money."

Now, I can't remember the order of the conversation; and then I later on towards the end of our conversation, I thought he acted stranger than ever when he said "Joe is sick," meaning his son that was dead in the casket.

* * *

[67] Q. Do you know about Mr. Lapiana's relationship with his son — with his grandson? * * *

* * *

THE WITNESS: He said, "He's cute as a button."

* * *

[69] CROSS EXAMINATION

BY MR. BULMAN:

* * *

[70] Q. You testified, was it in 1949 that you tried to teach Mr. Lapiana to read?

* * *

A. I mentioned the date, 1949, because that is the date I bought the house that — and I know that it was some — maybe two or three years after that. I don't know exactly. I don't remember.

* * *

Q. And how many reading lessons did you give Mr. Lapiana, Sr.? A. Oh, I'd say all I gave him was perhaps in one week's [71] time.

Q. How were you teaching him to read? A. With some little books that my children had had when they were in the First Grade.

Q. Now, you stopped teaching him after one week, one or two weeks? A. Well, I was in the act of buying a set of books, you know, to teach adults, and I wanted to find out really for sure if he wanted to learn and I found out —

Q. That is not my question. My question is, how long or did you only teach him for one or two weeks? A. I'd say I tried about four or five times.

* * *

[76] THOMAS B. SCOTT

* * *

DIRECT EXAMINATION

BY MR. SCHUETTE:

Q. What is your name and address? A. Thomas B. Scott. I have offices at 1200 Eighteenth Street, Northwest.

Q. What is your occupation? A. I am an attorney.

* * *

[78] Q. What was your recollection with respect to his physical and mental condition if anything? A. Well, the first occasion I had to see Mr. Lapiana, Sr. was a few days prior to Mr. Joseph, Jr.'s death. I had come by to see Joseph, Jr. as to how he was coming along and [79] at that time Mr. Lapiana, Sr. was present. And during the time I was there, Mr. Joseph, Jr. had a seizure and he had it at the time when Mrs. Lapiana, Jr. was brushing his teeth, and his teeth and every thing locked together and Mr. Lapiana, Sr. blew into a rage and said that everybody was trying to do things that were wrong, that they were trying to see that he didn't get better and that all of them ought to just stay away from him.

That was the first time that I had had an opportunity to see or hear Mr. Lapiana, Sr.

The second time that I had an opportunity to see him was when I went down to talk to him the day before Mr. Joseph, Jr. died, concerning the cemetery lots in Fort Lincoln because I was given to understand that Mr. Lapiana, Sr. who had title to the lots, Number One, was asking that money be paid for any lot that —

THE COURT: Well, let's don't give what you understood. Just your conversations with Mr. Lapiana and your observation.

THE WITNESS: I discussed with Mr. Lapiana, Sr. in the presence of his wife about the cemetery lots at Fort Lincoln, asking him whether or not he would require us to pay for the lots, one, or whether even he would allow Joseph, Jr. [80] to be buried there and after discussing it with him, in general, and incidentally, most of the conversation I had in the presence of Mr. Lapiana, Sr. was carried on by his wife, I was told by them, both of them at that time, that they would allow him to be buried there and also that they would not require us to pay money for the lot.

I told Mr. Lapiana, Sr. that in view of the fact that Joseph, Jr. was an adopted child, that Junior was an adopted child, that I thought that regardless of whether I prepared a will for him or had somebody else prepare a will, that I thought it would be to his interest to have a will drawn.

He sort of grunted and didn't indicate one way or another. They did indicate to me at the time that they would contact me concerning the properties he had at a later date presumably so that I could take care of those as an attorney later on.

BY MR. SCHUETTE:

Q. When was the date of this conversation, if you recall? A. This was the day before Joseph died, which would be the 14th of January, 1963. After that I got a call from Mrs. Lapiana, Sr. and asking me to

return the files concerning the properties, income tax returns and the like, that may be in Mr. Lapiana, Sr.'s file to them which I did. I was never retained [81] formally by Mr. Lapiana, Sr. as his attorney.

* * *

[82] Q. Were his movements slow? A. I would say so. He had very little to say in answer to my query about the suggestion of making a will, either by me or some other attorney, the reply was sort of a grunt, wasn't an audible yes or no.

* * *

[83] BETTY JO KENNEY

* * *

DIRECT EXAMINATION

BY MR. SCHUETTE:

* * *

Q. Are you the sister of the — Mrs. Lapiana, Jr.? A. I am.

[85] Q. Mrs. Kenney, I direct your attention to the fall of 1962. What, if anything, were you doing at that time in connection with the Lapiana's — Mr. Lapiana, Jr. for example? A. Well, I remember the fall of 1962 quite well.

* * *

THE WITNESS: * * * Joe Lapiana, Jr., my brother-in-law, was then very sick and he went to the hospital and was operated on. It was found that he had a brain tumor and of course we nursed Joe during that period. * * * [86] As far as Mr. Lapiana, Sr., I did not see him too frequently during that period enough to have come to any conclusion other than on one occasion when Mr. Lapiana, Sr., I entered the room to find him arguing with Joe, Jr.

His argument seemed to be directed toward Joe's going to his office to go to work, which was not at all conceivable since Joe was in a semi-paralyzed condition.

[87] Q. Was he in bed at the time? A. He, Joe?

Q. Joe, Jr. A. Yes, he was.

Q. Could he get up and walk around? A. No, we had to help him go to the bathroom, and things like that. Joe was not able to feed himself.

* * *

[88] Q. Did he read the paper, newspaper? A. No.

Q. How do you know? [89] A. I know he couldn't.

Q. Did he ever pick up the paper and look at it? A. I can't recall. I remember the thrill he would get from finding something in Italian either on the radio or on television to look at, and it was necessary always for the children or myself or whomever else might be around that would be so interested to explain things to him, that he would see either in writing or even on television; he could not understand phrases at this point, you know, that the average American person could.

THE COURT: Could he read Italian?

THE WITNESS: I could not say that, Your Honor, if you are speaking to me.

THE COURT: Yes.

THE WITNESS: I truthfully couldn't say.

* * *

[91] BY MR. SCHUETTE:

Q. Did he ever give any indication of being mentally confused? A. I'm not sure I should pass judgment but I am afraid he did, yes.

Q. Can you give specific examples? A. Well, in the first place, it would have been most unlike Mr. Lapiana, Sr. to have ever seen Joe in pain, Joe, Jr. in pain, and to be like he was but it was at though Pop could not conceive of the fact, and he admitted that he did not believe that Joe was sick, nor would he die. He could not — he wasn't capable, I don't believe, of understanding — I mean, I know that none of us wanted to believe it but Pop was not capable of understanding, in my humble opinion, that we [92] were going to — the inevitable was that Joe would die.

* * *

CROSS EXAMINATION

BY MR. BULMAN:

* * *

[94] Q. Isn't it a fact that Mr. Lapiana never told you that he could not read? A. It is not a fact that he never told me that he could not read. He might not have come directly out and said so but I have on occasions taken books, joke books, and read them and explained them to Pop.

Q. But he did never tell you that he could not read? A. That was never necessary.

* * *

Friday, November 12, 1965

* * *

[102] ELSIE ROLL

* * *

[103] DIRECT EXAMINATION

BY MR. SCHUETTE:

* * *

[104] Q. Now, I call you attention to the fall of 1962. Did you have occasion to visit with Mr. and Mrs. Lapiana, Jr. in their home at that time? A. Yes, as I remember, it was around Thanksgiving time but they were having Christmas a month early. * * * as I recall, Mr. Lapiana, Jr. was very quiet and very moody and depressed that day, * * * [105] the one thing I noticed about him was that he was terribly depressed and he was very very quiet, which was entirely different from the way I used to know him. The way I knew Mr. Lapiana, Sr., he was a very proud man and he was a very dominating personality. He did all the talking for the family so to speak.

Q. At this particular time, when you were there, was Mrs. Lapiana, Jr. there also? A. Yes, Mrs. —

Q. What, if anything, did you observe with respect to their rela-

tionship? A. Well, as I recall, since — she was doing most of the talking and he was saying very little. In fact, he was sort of in a world of his own.

Occasionally she would have to turn to him and ask him, "Don't you think that's right?" and he would more or less nod * * *

[106] Q. Did you have occasion to observe his physical movements? A. Well, he sat most of the time. As I say, he sat in a huddled position, which amazed me no end because from the forceful, dominating personality I used to know, this was a quiet, subdued man.

Q. Let me ask you this: Do you know of your own knowledge whether Mr. Lapiana, Sr. could read? A. I knew that he could not.

Q. What do you base that on? A. Well, for one thing, he used to say very often, he says "Here am I, a man who can't read or write, and I have made more money in my lifetime than some of these college men." He used to say that many many times.

* * *

[107] Q. How do you characterize his discussion with you on that day, the day before Joseph, Jr. died? A. Well, he was very talkative, he was very emotional. That is, his voice quivered and he had tears in his eyes and he was more or less living in the past, he was telling me that.

* * *

[110] Q. Other than what you have already testified to, can you tell us with respect to his mental condition based on your observation of him in the fall of 1962 or in the first month of — January — 1963? A. Well, his —

Q. How would you describe his speech for example? A. Well, he —

Q. Was it slow? A. It was either very very slow or he tried to rush the words out very very fast. It was — and also the fact that he kept saying "Joe is just going to be here for a short time." Joseph —

this is Joe, Jr. — and that "he's going to get well and that he's going to come home," and this is when all of us knew that death was very very near.

There again, it is my opinion, Judge. I don't know whether I should say this or not.

THE COURT: Well, just tell us the reasons for your opinion.

THE WITNESS: He seemed to act like a little child would act, that everything was going to be all right, and that things were going to be the same as they were before.

* * *

[111] Q. How would you describe the relationship of Mr. Lapiana, Sr. with his little boy — with his grandson, excuse me? A. He was very affectionate towards the little boy. He seemed to be pleased that he had a little namesake. That is the impression I received.

I noticed, though, that whenever he tried to pick up the little boy and — that Mrs. Lapiana, Sr. would more or less take the little boy away from him. I couldn't understand that.

* * *

[112] A. *** he was very moody and quiet. And Mrs. Lapiana, Sr. would prod him to respond.

* * *

[114] CROSS EXAMINATION

BY MR. BULMAN:

* * *

Q. What do you mean by "huddled in a chair"? Was he [115] sitting normally like any person would sit in a chair? A. Well, he was huddled. As I mentioned, he was a tall, proud looking man, and he seemed subdued and he was huddled, yes.

Q. Was he quiet or was he huddled in the chair -- I mean how was he -- A. He was like this. (indicating)

Q. He was sitting quietly in the chair; is that right? A. Well, his

head was sort of lowered. It wasn't like him. The contrast was so noticeable to me because I knew him as a tall, straight, proud looking man.

* * *

[126] FRANCES SLUTTER

* * *

DIRECT EXAMINATION

BY MR. SCHUETTE:

* * *

[127] Q. When did you first meet them? A. I met Mr. and Mrs. Lapiana on the occasion of the christening of their son Joseph, III.

Q. And when was that, if you know? A. It was in November of '61.

Q. On that occasion, did you have an opportunity to observe Mr. Lapiana, Sr.? A. He was there. Yes, I did.

Q. How would you characterize his physical condition at that time? A. Well, Mr. Lapiana seemed to me to be very slow in comprehending.

* * *

[128] Q. Can you describe how he walked? A. He had a very slow,uneven and unsteady gait.

Q. Can you describe any other facets of his physical appearance? A. He also had a tremor of his head and a tremor of his hands.

Q. Was this very noticeable? A. It was to me.

Q. How would you describe the motion of his head? A. Well, he was back and forth in a horizontal way.

Q. What do you mean by that? To the right or left? A. From shoulder to shoulder.

* * *

[129] Q. How would you describe his speech? [130] A. Well, he would -- he spoke very broken ***

* * *

Q. [131] Do you know of your own knowledge whether Mr. Lapiana, Sr. could read? A. He boasted one time that he neither could read nor write before my husband and myself.

Q. Do you know, of your own knowledge, Mr. Lapiana, Sr.'s attitude towards his grandson? A. I think -- in my opinion, he loved his grandson and he displayed this -- it was Christmas a year ago when he was there, and he was down on the floor with the little boy, and at the time his wife said to him -- Mrs. Pat Lapiana -- "Pa, let's go," and he seemed very reluctant to go. He wanted to stay, and she said "Let's go," and he got up and left.

Q. How would you describe Mr. Lapiana, Sr.'s relationship with his wife based on your own personal observation? A. I think she was very domineering as far as I could see.

* * *

[134] CROSS EXAMINATION

BY MR. BULMAN:

* * *

[135] Q. Did you see Mr. Lapiana, Sr. in January, 1963? A. Yes, I did.

Q. And when did you see him in January? A. When his son was buried.

Q. That was at the funeral, I take it? A. I saw him at the funeral. I saw him right after Joseph, Jr. had died.

Q. How about prior to that time, did you see him at all in January? A. We were going back and forth to the hospital a number of times and I know one time I observed him in the solarium reading the paper upside down and I made a comment to my daughter, how in the world he could read the paper upside down.

* * *

[137] Q. *** do you remember anything else that would show his mental condition or any other facts?

* * *

[138] THE WITNESS: My husband was telling him about the D.C. Fire Department.

THE COURT: D. C. what?

THE WITNESS: D. C. Fire Department, that he worked for the D.C. Fire Department, and he was telling him about this. He even mentioned the fact that the ambulance from his fire house had taken Mr. Joseph Lapiana, Jr. to the hospital, and yet he didn't seem to comprehend. He turned around immediately after that: "What kind of work do you do?" In that fashion.

* * *

[140] ELLA ANDERSON

* * *

DIRECT EXAMINATION

BY MR. SCHUETTE:

* * *

[141] Q. Did you have an occasion to see Mr. Lapiana, Jr. -- excuse me, Mr. Lapiana, Sr. -- in 1963? A. Yes, sir.

Q. When was that? A. It was right after he lost his son, Junior.

[142] Q. Where did you see him? A. I saw him at 14th and Park Road, Northwest.

Q. And did you talk to him? A. Yes, I did.

Q. What was the nature of your discussion with him? A. Well, first he took a hold of my hand and we went in the drugstore and we had a coke and he looked like he had been through the mill; and he couldn't find the money to pay for the Coca Cola so I offered to pay for it but he wouldn't let me. It took him about 10 minutes to find a dime to pay for the coke.

Q. What was the nature of your discussion with him? A. And he asked me about my family, which he knew very well. Then he went on to telling me how bad he was feeling, that he had just found out that he was 89 years old. What brought that on, I don't know because I certainly hadn't asked him.

Q. What did he look like? A. He looked terrible.

Q. What do you base that on? A. Well, he had on this old, beat-up hat and his collar was open, which I had never seen before. He didn't look like Mr. Lapiana that I had known through the years.

[143] Q. What did he say to you other than what you have already testified to? A. He asked me if I lived by myself and I said "Yes," I did.

Q. All right. A. And he started crying and he kissed me goodbye, and I did not ask him to come to my apartment, and he said he was going across the street to kill some time at the real estate office.

* * *

[144] Q. Did there come a time in 1959 or 1960 that you had a discussion with him, Mr. Lapiana, Sr., about how he intended to dispose of his property? A. Yes, on the telephone.

MR. BULMAN: Your Honor, I object to this question. This is leading.

THE COURT: All right, go ahead.

THE WITNESS: I talked about it over the telephone with Mr. Lapiana; and he told me that the biggest part of his money was going to Sacred Heart Church at 14th and Park Road, that his wife would get just what she had when he married her and I was to have $5,000, and of course his son.

* * *

[145] ANGELA T. PRESTERA

* * *

DIRECT EXAMINATION

BY MR. SCHUETTE:

* * *

[148] Q. Did you have occasion to see Mr. Lapiana, Sr. in the fall of 1962? A. Oh, yes, sir.

Q. When did you see him? A. September, '62, around September; I paid a visit to Rebecca and my cousin Joseph Lapiana, Jr. and the baby and Mr. Lapiana, Sr.

Q. Did he say anything to you at that time? A. I don't think he was in any condition.

Q. Did you say anything to him? A. Yes, I did.

Q. What did you say? A. I spoke to him as I always did, "Hi, how are you?"

Q. How did he reply? A. He was in a dazed condition. I don't think he recognized me or -- not really, or maybe he just ignored me. But this was the feeling that I got that he didn't even know I was around.

* * *

[149] Q. Did Mr. Lapiana, Sr. act any differently than he had when you had known him before? A. Well, he was a different man. He was a different man.

Q. What do you base that on? A. My uncle was a very heavyset, very decisivie man. He was a man that knew what he wanted and no one told him what to do, not even his first wife, who was my aunt.

* * *

[151] Q. Did there come a time about that time when you had an occasion to observe anything unusual with respect to Mr. Lapiana, Sr.? A. Yes, he had a very very bad tremor. He -- the one thing that was very noticeable at the time that he visited was saliva from the side of his mouth, loose -- a loose expression, not a person who had all his facilities; and I don't have [152] medical education but that was my opinion.

* * *

[155] Q. Other than the tremor with which you referred, were there any other movements that you noticed? A. Just -- I don't know how to put it, he was slow in his walk, his mannerism, a person who was just walking around in a daze.

Q. How much do you think he weighed when you saw him? A. Around 160, 150; it was a terrific difference from the size that he normally was.

Q. Was he a very -- did he move around a great deal? A. No, sir.

Q. How did he act? A. Very tired person.

Q. Were his eyes flashing, going from side to side? A. No, sir.

Q. What were they doing? A. He always had a dazed look in his eyes.

Q. Do you know what his attitude was towards his grandchild? A. He loved him.

Q. On what do you base that? A. Uncle Joe was a man who wanted his name carried on and they were very heartbroken when they found after many years with Rebecca and Joe, Jr. that they were unable to have a child. [156] And he loved his son dearly and he wanted his son to follow in his son's footsteps.

* * *

Q. In your observations of her and him, did you see anything unusual as far as they were concerned? A. I felt that Mrs. Patricia Lapiana, in my very few times that I saw her was a woman who led her husband.

Q. On what do you base this? A. Because he never -- he never asserted himself as he used to do. He just never talked. When she got up, I now -- going back to my counsin's funeral, he got up and when she was sitting he was sitting with her.

Q. Did he act in a mature way? A. No, sir.

Q. How would you say that he acted? A. Well, he wasn't old enough to be senile but -- a little boy, a little boy being led.

* * *

PATRICIA LAPIANA

[Direct Examination by Mr. Schuette]

[173] Q. Who were the doctors he went to most? A. Dr. Pacious and Finnegan.

* * *

[175] Q. Do you recognize this document? A. Yes.

Q. What is it? A. I don't know. Wait a minute, that is the will and testimony my husband made.

Q. Have you ever seen this before? A. I saw it about two months after we made it, occasionally.

* * *

[183] JOHN G. LOFFT

* * *

DIRECT EXAMINATION

BY MR. SCHUETTE:

Q. What is your name? A. John G. Lofft. L-o-f-f-t.

Q. Where do you live? A. 1616 18th Street, Northwest.

Q. And do you have offices at that address? A. No, at 2029 Q Street, Northwest.

Q. What is your occupation or profession? A. Psychiatrist.

Q. What is your medical background? A. I received my medical training at the University of Toronto and the internship at the University of Saskatchewan Hospital. My psychiatric training consisted of two years at McGill University and two years at St. Elizabeths Hospital here in Washington but -- that is my training and then since that [184] time I was on staff at St. Elizabeths for an additional two years and then in private practice. And I have my certification in psychiatry with the American Boards of Psychiatry and Neurology.

Q. Has your attention ever been called to the problems of the aged? A. Most definitely, certainly during the period of my training, I had

responsibility for caring for a fairly large unit, over 150 patients, a geriatric unit in a mental hospital.

* * *

[185] Q. Assume, Doctor, that a man died in December, 1964; assume that this man, on January 1, 1958, loses by death his first wife when he is then 65 years of age; assume further that [186] although no children were born of the first marriage, this man legally adopted his first wife's son some 34 years previously.

Assume that the adopted son, for whom the man has great affection, marries, and being unable to, with his wife, have children, in turn adopts a child on November 1, 1962.

Assume that the child is the recipient of attention and affection by his grandfather. Assume also that the grandfather after losing his wife on New Year's Day, 1958, remarries on November 24th, 1958.

Assume that the man of whom we speak had little formal education and because of his birth and early years in a foreign country, Sicily, can speak only a little English; that he cannot read or write at all; that in spite of his foreign background and inability to read or write, he amassed a respectable fortune in excess of $100,000, composed, among other things, of stocks, real estate and mortgages; that in the fall of 1962, his adopted son is shown to have a terminal case of brain tumor and that all persons close to the son are aware of that medical fact; that in spite of the nature of the illness, the father continually expresses his thought to friends and relatives that his son will soon be well and that upon observing his son while on his death bed, he said to him, "Why are you not down at your office?" That when observed by some people, this man [187] of whom we speak has tremors of the hand and his head shakes from side to side and that saliva is seen dripping from the corner of his mouth; that the man who in past years was a leader of and spokesman for his family, is seen in 1962 at the age of 70 in his son's sick room hunched in a chair in the company of family groups

saying little or nothing; that prior to his marriage in 1958 and in the absence of ability to read or write, he drove his car frequently and obtained great pleasure from driving it; that after his second wife -- excuse me -- that in the fall of 1962, his second wife drove him in the car; that shortly after his son's last illness, he was heard to express the following thought to a person:

That he had just found out that he was 89 years old when in fact he was 71; that in his younger years he was proud and dominating in appearance and that at the time of his son's last illness and death, he appeared depressed, cried often, and had an uneven and unsteady gait;

That although he showed by his acts and words his great affection for his grandson, he made a bequest to him of $5,000 out of an estate of $100,000; and that the words of the will making such bequest are not legally binding;

That during the period from 1959 to 1963, the man had experienced a substantial weight loss; that while at the [188] hospital during his son's last illness, a friend of the family told him that he was a fireman and then went into detail about what he did, including the operation of ambulances, and so forth, and that then he finished his statement, the man said "What do you do?"

Based on the foregoing, Doctor, do you have an opinion based upon reasonable medical certainty as to whether or not the person mentioned was suffering from any form of mental disease or defect?

THE COURT: When?

BY MR. SCHUETTE:

Q. At the time of the execution of the will in January of 1963?

* * *

A. I have an opinion, yes.

Q. What is that opinion, Doctor? A. I believe the individual described would have a diagnosis of senile dementis.

Q. What is senile dementis, Doctor? [189] A. I'll try to give a quite brief description:

It's a gradually progressive disorder in which there is progressive disintergration of the intellect. One would see this gradual, progressive blunting and unresponsiveness of emotions and one sees in this disorder a gradual and progressive reduction in initiative and along with these changes in mental function, there would roughly parallel similar changes in the physical sphere, chiefly reduction in strength and reduction in vitality, and in this disorder one can discriminate it from the changes that one might find in the normal aging process, quite clear differentiation.

In other words, this disorder of senile dementia, or senile psychosis which is synonymous, there is more than just a quantative impairment of some of the normal attributes of the mind. In fact there is really a much more rapid disorganization of personality, the total personality, than one would find in the normal decline or the normal changes of aging.

When the diagnosis is made, it also suggests a prognostication or at least it suggests what the outcome will be because if a diagnosis is made, it implies a prediction of death within a period of just a few years. We usually consider the individual will decline in a gradual and progressive fashion, probably dying anywhere from three to five years after the first [190] symptoms are noted.

The onset of such a disorder is gradual and at first it would just seem to be acceleration of the normal process of aging but clearly it goes farther than that as more symptoms develop. Memory is the first mentalfunction hit and it is -- it appears to be recent memory, that is memory of events of a few hours or within the past day, whereas the individual retains very much remote memory quite clearly.

And along with the early signs would be the diminution of vitality and some narrowing of the interest range of the individual and along with blunting of emotions and some irritability coming into the behavior.

Now, although the illness would commence in a rather insidious manner, the development of senile dementia progresses fairly evenly and fairly rapidly so that if you look at the individual again in, say, two to three years after these very early symptoms appeared, one can note quite marked changes. At this point one would expect the individual to be quite slowed down, quite blunted in his emotional reaction rather apathetic, and the physical changes would be more pronounced. The individual would be more feeble and would have sort of a shrunken appearance, probably due to weight loss.

At this stage, the memory would be very much worse, [191] and it wouldn't -- it would show itself in a number of ways.

* * *

Q. Doctor, specifically based upon the hypothetical question that we have enunciated, what characteristics do you see in this hypothetical which are characteristic of a man with senile dementia? A. Well, let's consider the physical changes first which I mentioned generally parallel the mental changes:

The tremors of the body, the head, also the comment [192] that was made about the saliva would suggest to me loss of muscular tone of the mouth, the unsteady gait could also be considered physical manifestation of this and also the considerable weight loss.

Q. What about the tremor in the hands, Doctor? A. I included that too, body tremor, hand tremor. The most pronounced evidence that you presented would be in the area of the memory difficulty, the memory difficulty being severe enough for an individual to be actually disoriented about his age to the extent that you stated. One could understand, perhaps, an individual being in error by a few years about his age but the age difference here is -- would suggest to me quite considerable confusion about one's age. The inability to recall this conversation with the ambulance driver, the fireman, is, I think a particularly good example of the recent memory loss that these individuals have,

the inability to retain over a span of a few minutes facts that are presented earlier and being able to recall them or to recall the statements certainly would suggest an impairment of -- impairments of recent memory that are found in this disorder, the denial of his son's illness in spite of evidence to the contrary, that the son was gravely ill, again suggests intellectual impairment, refusal to accept facts or to integrate new information. I [193] would think the memory impairments would be the most pronounced evidence that would support this diagnosis.

MR. SCHUETTE: I have no more questions.

* * *

CROSS EXAMINATION

BY MR. BULMAN:

* * *

[195] Q. Doctor, it is true that you did not know Mr. Lapiana, Sr.? A. I did not know him.

Q. And you never examined him; is that correct? A. That's correct.

Q. Doctor, when did you make these notes? A. Last evening — I'm sorry, last evening and shortly before this hearing.

Q. And when you testified, were you testifying from your notes mainly?

* * *

[199] THE COURT: * * * "Doctor, based on the hypothetical question asked you by Mr. Schuette, would you be able [200] to say with reasonable medical certainty whether on January the 13th, 1963, Mr. Lapiana, Sr. knew what property he owned?"

THE WITNESS: I couldn't say.

* * *

BY MR. BULMAN:

Q. * * * Could you tell us within a reasonable degree of medical certainty whether Mr. Lapiana, Sr. would be able to recognize the natural objects of his bounty on January 14, 1963?

[201] A. No, I could not.

Q. Doctor, can you tell us within a reasonable degree of medical certainty whether or not Mr. Lapiana, Sr., on January 1963, would understand what he was going that day, what business he was engaged in? A. I couldn't say.

MR. BULMAN: I have no further questions, Your Honor.

MR. SCHUETTE: No questions, Your Honor.

THE COURT: You may step down, Doctor, thank you.

Is there any reason why the doctor shouldn't be excused?

MR. BULMAN: No, Your Honor.

THE COURT: You may be excused, Doctor.

* * *

[205] Monday, November 15, 1965

* * *

[206] THOMAS J. LONG

* * *

DIRECT EXAMINATION

* * *

[207] BY MR. SCHUETTE:

Q. Did there come a time when you told Mrs. Patricia Lapiana about the execution of this will? A. She knew about the will. Mrs. Lapiana had me come over there to sit down and help make out the will; and when I came over, Mrs. Lapiana left. It wasn't anybody in the house but Mr. Lapiana and myself.

* * *

[208] Q. Have you been to the home of Mr. and Mrs. Lapiana, Sr. on a number of occasions? A. Many times, yes.

Q. Are you an old friend of Mr. Lapiana? A. I have known Joe for about, I'd say, between 15 and 18 years, I think around 1947, I guess.

Q. Did you go to his funeral? A. Yes, I went to the church. I didn't go to the cemetery.

Q. Did you go to the funeral parlor? A. I did.

Q. After Mr. Lapiana, Sr. died, you saw — did you see Patricia Lapiana on several occasions? A. Yes.

Q. Did you see her at your home? [209] A. My home?

Q. Yes. A. She'd been over my house but I don't know just when it was.

Q. Did you see her at her home? A. Yes, I saw her at her home.

Q. Did you see her at your office? A. No.

Q. Did you talk to her on the phone? A. Yes.

Q. Did you call her or did she call you? A. I may have called her. She may have called me. I don't remember.

Q. Was this shortly after Mr. Lapiana, Sr. died? A. Well, sometime afterward, I suppose.

Q. Was it before Christmas? A. I didn't keep any diary. I would be able to tell you that.

Q. When was the first time you saw Patricia Lapiana after Joseph Lapiana, Sr. died? A. I saw her when he was laid out at Hines — at the undertaker's.

Q. She say anything to you about the will at that [210] time? A. She did not.

Q. When was the first time after Joseph Lapiana, Sr. died that you discussed the making of the will with her — the fact — had any discussion with her about a will? A. I don't remember. I suppose she found the will after Mr. Lapiana passed away because he — I gave him the will and he put it away somewhere, I don't know.

Q. She tell you whether she found it? A. No, I didn't ask her.

Q. Have you prepared wills for other persons other than Mr. Lapiana? A. That is the first one I have ever prepared, right there.

* * *

[211] Q. * * * Is that a printed form? A. The form itself, yes, the regular form you can buy at any stationery store.

Q. Where did you buy that form? A. I think I bought that form on 14th Street, next to the Riggs Bank.

* * *

Q. Have you had any background in the preparation of wills? [212] A. I attended law school at Georgetown years ago, about 1907 or '08, or something like that.

Q. So then you have had formal training in the preparation of wills? A. No, I don't remember taking any training in the wills at all. I first went to Georgetown Foreign Service School, then went to night school, law school. I didn't graduate and never practiced.

Q. Is it your testimony that you did not have any formal training in the preparation of wills? A. That's right, I never had any preparation in the form of wills in the law school.

Q. Did you do any home study in the preparation of wills? A. No.

* * *

[215] Q. Why, Mr. Long, did you put that clause to which the judge just referred in the place where it is? A. You mean where it says "I give, devise and bequeath to my beloved wife, Patricia Lapiana"

Q. Right.

* * *

A. Well, that is the will. That is the way he wanted it written.

* * *

[219] Q. Was that will read aloud to Mr. Lapiana, Sr.? A. I read it to him a couple of times, yes.

Q. Did you read it in his presence the day the will was executed? A. I don't know about that but I read it —

Q. I asked you, did you read the will to him? A. That, I don't remember. I read it to him several times at his home after I had it typewritten from the notes I took on — over his —

Q. I didn't ask you that question.

Look here; is that your signature? A. Yes, looks like it.

Q. Is this a statement that you made for me on — A. Could have been, yes, I remeber you came —

Q. — 18 January, 1963? A. I don't know the date. I remember you came up to Mrs. Banks' office.

Q. I ask you to read this right here. A. What's that — "it was not read aloud."

Well, I mean I didn't shout it out or anything. We sat down together and I read it to him. That's all. At his house. I don't remember reading it at all. In fact, I don't think I did at the office when he came over to sign because he had already read the thing two or three times and he read my notes before I thought about typing this up.

* * *

[221] A. * * * [222] I sold some of his properties.

* * *

[223] MR. BULMAN: Your Honor, at this time I would like to move respectfully to the Court for a directed verdict on both issues posed in this case; and from what I understand, there are two issues in question.

Number One; There is mental capacity at the time the will was executed.

Number Two: There is a question of undue influence.

THE COURT: Well, they also have fraud and deceit in the issues. Do you claim fraud and deceit, Mr. Schuette?

MR. SCHUETTE: Yes, I'd like to be heard at the proper time.

* * *

MR. BULMAN: * * * [224] I was under the impression that under the opening statement, no fraud or duress was alleged but, be that as it may, I would move for a directed verdict on all issues as they stand.

[226] Mr. Thomas Scott, * * * the day the will was drawn, * * * approached Mr. Lapiana to make a will on that day, * * *

* * *

[227] MR. BULMAN: * * * [228] Our evidence also showed that he knew who his son was. He knew his grandson. He knew his wife, and on the day of the execution, he came into Mrs. Banks' office on his own power, that he asked them to sign the will; also that all his property at that time that he owned was in the will.

And due to these facts, I respectfully ask the Court to direct a verdict on all the issues of the case, that there is no evidence here at all that would allow a jury to reach the conclusion that the man was not of sound and disposing mind on the day that the will was executed, and there is no evidence at all showing any fraud, duress, coercion or undue influence on the behalf of Mrs. Lapiana to execute this will.

Thank Your Honor.

THE COURT: All right.

All right, Mr. Schuette, would you first please address yourself to what evidence you think you have introduced that shows fraud or deceit.

MR. SCHUETTE: Yes, sir.

THE COURT: Practiced upon the decedent by Patricia [229] Lapiana or any other person.

MR. SCHUETTE: * * * [230] On the issue of fraud, Your Honor, it seems to me she had a fantastic amount of opportunity, for the draftsman of the will, whose testimony I think is questionable, and the beneficiary of the will, whose testimony I suggest is questionable, on a number of issues, particularly on the facts, I think the jury should be given an opportunity to see whether she truly did [231] not know what was in that antenuptial agreement; and based on these facts —

* * *

THE COURT: Well, if you are through with fraud [232] and deceit.

MR. SCHUETTE: Yes, sir.

* * *

[233] MR. SCHUETTE: * * * all these things taken together, the

undue influence, the fraud and lack of requisite mental capacity and the execution of the will itself, I think are subject to substantial doubt and they all interrelate.

* * *

[235] THE COURT: * * * Certainly you can't infer any undue influence, any fraud or lack of mental capacity from the terms of the will.

* * *

[236] You just don't have one * * * scintilla of evidence to show lack of mental capacity, to show fraud or duress, or to show undue influence.

* * *

[237] THE COURT: * * * Ladies and gentlemen, of the jury, the Court has ruled that as a matter of law, if we consider all of the evidence in the case and interpret the evidence most favorably to the plaintiff or caveator, and if we give the plaintiff the benefit of all inferences which may reasonably be drawn from that evidence, that there is still not sufficient evidence in the case from which reasonable men and women could find that Joseph Lapiana, Sr., at the time of making his will, was not of sound and disposing mind and memory and capable of executing a valid deed. There is not sufficient evidence so interpreted to show any fraud or deceit practiced upon Joseph Lapiana by Patricia Lapiana, or other person or persons. There is not sufficient evidence from which reasonable people could find [238] that the paper writing dated the 14th day of January, '63, was obtained or the execution procured from Joseph Lapiana, Sr. by the influence or duress or coercion of Patricia Lapiana, or any other person, and it therefore follows that the paper writing filed in this court bearing the date January 14, 1963, was the last will and testament of Joseph Lapiana, Sr.

I therefore direct the jury, on Question 1, which will be read to you by the Clerk, to answer that question "yes," to answer the second question "no," the third question "no," and the fourth question "yes."

Would you take the verdict, please.

DEPUTY CLERK: The jurors will please rise.

Members of the jury, by direction of the Court, your verdict is as follows:

As to Issue Number 1, "Was Joseph Lapiana, Sr. at the time of the making and subscribing or of the acknowledging by him of the paper writing dated January 14, 1963, of sound and disposing mind and memory and capable of executing a valid deed of contact?" your verdict as to this issue —

THE COURT: Your answer.

DEPUTY CLERK: Your answer as to this issue is "Yes," so say you each and all.

As to Issue Number 2, "Was the said paper writing [239] dated the 14th day of January, 1963, obtained, or the execution thereof procured from the said Joseph Lapiana, Sr. by fraud or deceit practiced upon the said Joseph Lapiana, Sr. by Patricia Lapiana, or any other person, or persons," your answer to this is "No," and this is your verdict as to this issue, so say you each and all.

As to Issue Number 3, "Was the said paper writing dated the 14th day of January 1963 obtained, or the execution thereof procured, from the said Joseph Lapiana, Sr. by influence or duress or coercion of Patricia Lapiana, or any other person, or persons?" your answer to this is "No," and this is your answer by direction of the Court, so say you each and all.

As to Issue Number 4, "Was the paper writing filed in this court and bearing the date, the 14th day of January, 1963, the last will and testament of Joseph Lapiana, Sr?" and your answer to this issue is "Yes," by direction of the Court and this is your verdict, so say you each and all.

* * *

BRIEF FOR APPELLANT [redacted]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,085

REBECCA D. LAPIANA,

Appellant,

v.

PATRICIA LAPIANA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Attorney for Appellant

STATEMENT OF QUESTION PRESENTED

In the opinion of appellant, the question presented on this appeal is whether the District Court was correct in directing a verdict for the caveatee in a will contest at the conclusion of the caveator's evidence which showed: the testator was illiterate and the will was not read to him at the time of its execution, and that he was physically and mentally feeble and was suffering from concern over the illness of his only son; that the sole beneficiary, testator's second wife, obtained the services of the draftsman of the will and testified that she participated in the making of the will and had access to it thereafter; that the will increased her claim against the testator's estate from $20,000 (under an antenuptial agreement executed four years before the will was drawn) to over $100,000; and that of the witnesses to the will only the draftsman could identify the sheet containing the dispositive provisions and only he could identify the ribbon which allegedly connected this sheet to the one bearing the testator's signature.

Appellant contends that this Court Should answer this question in the negative.

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TABLE OF CASES

MISCELLANEOUS

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* Cases chiefly relied on.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant filed in the United States District Court a Petition for Caveat of the will of Joseph Lapiana, Sr., deceased (J.A. 4). After the framing of issues, trial was had on November 9, 10, 12, and 15, 1965, ending when the court below directed a verdict in favor of the caveatee. Caveator's motion for a new trial, filed November 24, 1965, was denied by order entered December 7, 1965 (J.A. 25 Notice of appeal was filed

on January 3, 1966 (JA 25). The District Court had jurisdiction under Section 19-312 of the District of Columbia Code (1961 edition).

This Court has jurisdiction of the appeal under Title 28, United States Code, Section 1291 and 1294.

STATEMENT OF CASE

Joseph Lapiana, Sr., 72, and a resident of the District of Columbia, died on December 11, 1964, leaving what purported to be his last will and testament, dated January 14, 1963. The will was duly submitted to the United States District Court, sitting as a Probate Court, for allowance to which his heir at law, the infant Joseph Lapiana 3rd, through his mother, natural guardian and next friend, Rebecca D. Lapiana, the plaintiff-caveator interposed a formal objection, by Petition for Caveat, on the grounds, among others, that the will was not the last will and testament of the decedent as it was not executed in conformity with the requirements which the law testamentary in this jurisdiction makes and provides, and further that the testator lacked the requisite mental capacity to execute a will. Upon the caveat and the responses thereto, the usual five formal issues were framed for trial by order of May 12, 1965: one, whether the purported paper writing was the last will and testament of the decedent; two, whether the purported will was executed and attested in due form as required by law; three, whether the decedent was of sound and disposing mind and capable of executing a valid deed or contract at the time of making, subscribing, or acknowledging the said paper writing; four, whether the said instrument was obtained or its execution or subscription procured from the decedent by fraud or deceit; and five, whether the paper writing was obtained or its execution procured by undue influence or duress or coercion.

At trial the proponent of the will sought to prove the will. He called the subscribing witnesses and they were examined and cross-examined by counsel. Thereafter counsel for the caveator was asked whether he

had any testimony with respect to the execution of the will, and he replied that he did not. The trial judge then held that due execution of the will had been proved (JA 31). Thereafter, contestant put in her case and upon the conclusion thereof and on motion of the caveatee for a directed verdict with respect to issues "three" and "five" as numbered herein above (J.A. 61), That motion was granted. (Tr. 237). The trial judge then directed a verdict for the caveatee with respect to the issues "one," "three," "four," and "five" (J.A. 63). He made no disposition whatsoever of the second issue: whether the purported will was executed and attested in due form as required by law.

Probate was ordered and thereupon the caveator moved the trial court to vacate its order directing a verdict and to grant a new trial. The motion was denied without a hearing and an appeal was then taken to this Court.

Form of Alleged Will. The alleged will offered and admitted into evidence (Tr. 29) consists of two separate sheets. Each sheet has part of a "will form" printed on it. Sheet 1 contains printed standard introductory will terminology with space provided for specific bequests and devises. Sheet 2 contains printed standard language for a residuary clause, signature and attestation. The sheets accepted into evidence were tied together with a red ribbon, although one of the witnesses thought that the will she had witnessed was "stapled" together (JA 30). There are a number of knots in the ribbon.

All of the dispositive provisions are typewritten and appear on Sheet 1. While there is a printed residuary clause on Sheet 2, this is not used. Instead, a clause leaving all real and personal property to caveatee-defendant appears first on Sheet 1. This arrangement invalidates the subsequent bequests. (Tr. 216) Following this clause there is a precatory, non-binding, request that the testator's grandson, Joseph Lapiana 3rd — on whose behalf the instant caveat was filed — receive $5,000 for his

education at age 18. It was shown that the draftsman of the will is a *former law student* (J.A. 60).

Sheet 1 of the alleged will contains only typing and printing. There is no handwriting of any kind on this sheet. There are no initials, dates, circles or other handwritten markings of any kind by either the testator or the subscribing witnesses on Sheet 1 which might have been utilized for subsequent identification. One of the subscribing witnesses said that she had not read this sheet and did not know what it contained (JA 29-30). She was not able to cite any concrete basis for its identification. (JA 39-31. The only other witness was the draftsman of the will.

Sheet 1 of the purported will has nothing on it which refers to Sheet 2; and Sheet 2 has nothing on it which refers to Sheet 1. Each sheet, standing alone, contains an independent, completed, thought. The "will form" sheets may be purchased at any stationery store (JA 59).

Sheet 1 and Sheet 2 have no internal connection whatsoever. Thus there is no continuation of a sentence from Sheet 1 to Sheet 2. Nor is there a succession of numbered paragraphs from Sheet 1 to Sheet 2.

Terms of Will Reviewed in Context of Testator's General Family Situation. As noted, the alleged will left all of the testator's real and personal property to his second wife to whom he had been married for four years. The estate subject to probate was valued in excess of $100,-000. Prior to her marriage, in November, 1958, the sole beneficiary under the will had entered into an antenuptial agreement with the testator wherein she agreed to limit her claim on his estate to $20,000.

The will made no reference to the testator's son, Joseph Lapiana, Jr. whom he had loved and cherished for 40 years, other than an invalid cancellation of an alleged $1500 debt. The testator, an attorney who practiced in Washington, D. C. (Tr. 33), died on January 15, 1963, one day after the instant will was allegedly executed.

As noted, the will made only a passing precatory reference to the testator's grandson, Joseph Lapiana 3rd, who had been taken into the care and custody of Joseph, Jr. and Rebecca Lapiana — the appellant herein — at birth and thereafter adopted by them. The testator was extremely fond of the infant. Uppermost in his mind was the thought that he wanted the family name carried on (JA 35). He played with the little boy "almost daily" (JA 35), thought he was "cute as a button" (JA 38), and seemed to be pleased he had a little namesake (JA 45).

Testator Could Not Read or Write. Substantial evidence was adduced at the trial, from a number of different witnesses, that the testator could not read or write. Thus "It was just an accepted fact that he couldn't read because we would have occasion to read things for him." Joseph Lapiana, Jr. personally read documents for him (Rebecca Lapiana, Tr. 32). He "unequivocally could not read" (*Id.* Tr. 42). His bookkeeper was going to teach him to read but dropped it after a few days (Ruby Winslow, Tr. 68). She was absolutely certain that he could not read (*Id.* JA 36-37). She tried to teach him four or five times (*Id.* JA 39). She used some books her little children used in the first grade (*Id.* JA 39). He could not read the newspaper (Betty Jo Kenney, JA 42). "It was always necessary for the children or myself or whoever else might be around . . . to explain things to him that he would see in writing . . ." (*Id.* JA 42). "He used to say very often 'Here I am a man who can't read or write, and I have made more money in my lifetime than some of these college men.' He used to say that many times." (Elsie Roll, JA 44) He boasted before Francis Slutter and her husband that he could not read or write (Frances Slutter, JA 47). At a time shortly before the alleged will herein was drafted while his son Joseph Lapiana, Jr. was dying from a brain tumor, he was observed in the hospital solarium "reading the paper upside down." (*Id.* JA 47)

Will Not Read to Testator. Testimony of both witnesses to the alleged will confirm that it was not read to the testator at the time of its

execution. Thus Mrs. Minnie L. Banks, one of the subscribing witnesses to the alleged will, said that while the testator "looked" at the will he did not dictate it aloud (JA 30-31). She said further that she had not read the will (JA 29-30), that the contents of the will were not discussed in her presence (JA 31), and that all she was "interested in" was that the testator "asked me to sign and I signed it." (JA 30)

The other witness to the alleged will and its draftsman, Mr. Thomas J. Long, while suggesting on the one hand that he had "read it (the will) to him a couple of times at his home' prior to the day the will was executed (J.A. 60), and, on the other, that the testator "had already read the thing two or three times and he read my notes before I thought about typing this up" (J.A. 61), finally admitted that he did *not* read the will in the presence of the testator on the day the will was executed. Thus when asked: "Did you read it in his presence the day the will was executed?" (J.A. 60) he replied: "I don't remember reading it at all. In fact, I don't think I did at the office when he came over to sign . . ." (J.A. 61).

While, as noted, the draftsman states that the testator "read" the will at his home the day before it was executed, it is noted that four witnesses testified that the testator could not read at all, two of them indicating that he had boasted of this fact. It is noted also that the draftsman-subscriber-former law student had known the testator for 15 to 18 years (JA 27), and that counsel for the caveatee did not seek to develop through Mr. Long the testator's alleged reading capacity — alleged by Mr. Long — although this matter had been gone into heavily throughout the trial theretofore.

Testator Was Enfeebled and Senile at the Time of the Execution of the Alleged Will. Substantial evidence was adduced at trial that the testator, at and about the time of the making of the alleged will, was in an enfeebled physical and mental condition and was suffering from senile dementia. Thus it was established that after his son became ill in 1961 a vast change was noted in the testator's mental condition, that he was

rambling and completely incoherent in his speech, and that he was out of touch with the realities of his son's illness (JA 32). While his son was in his final illness and staring at the ceiling, he became angry, irate, and carried on a terrible scene with the son because he failed to pay back some money the son had loaned him (J.A. 33). Once when his daughter-in-law was brushing his son's teeth during the son's final illness, the son had a seizure and the testator flew into a rage saying that she should leave the son alone and not bother him, although she was merely trying to do her job (JA 34). He was moody and depressed (JA 34, 43). On the day the will was allegedly executed he had a discussion with Elsie Roll. She said that he "was very talkative, he was very emotional. That is, his voice quivered and he had tears in his eyes and he was more or less living in the past" (J.A. 44). "He seemed to act like a little child . . ." (J.A. 45). At a time only a few months before the making of the alleged will he was observed to be "very moody and quiet. And Mrs. Lapiana would prod him to respond." (J.A. 45) "He said very little. He was sort of in a world of his own" (J.A. 44). Only a few months before the making of the will he was observed "huddled in a chair," subdued, with his head lowered, in contrast to his appearance some years prior when he was a tall, straight, proud looking man (JA 45-46). In November, 1961 he was observed to have a "very slow, uneven and unsteady gait." He had a tremor of his head so that it went back and forth in a horizontal way from shoulder to shoulder. He had a tremor of his hands. (J.A. 46) Right after the time his son died in 1963 (and the time he allegedly executed the will herein), he was observed "to have great difficulty in finding money to pay for a Coke at a drug store. It took him about 10 minutes. Then he volunterred that 'he had just found out that day that he was 89 years old.' He wore an old beat up hat and his collar was open. He looked terrible. He started crying." (J.A. 48-49) In September 1962 he was observed to be in a "dazed condition." (J.A. 50) He had a "very, very bad tremor." There "was

saliva (coming) from the side of his mouth." He had a "loose expression." "He did not appear to be "a person who had all his faculties." (J.A. 50) He would not accept the fact that his son was seriously ill (Tr. 152). He never said anything. He was in shock, I assume. (Tr. 152) "He was slow in his walk, his mannerism, a person who was just walking around in a daze. (J.A. 50) He had suffered a terrific weight loss (J.A. 50). He acted very tired and had a "dazed look in his eyes" (JA 51). He acted "like a little boy, a little boy being led." (JA 51)

"He didn't seem (able) to comprehend." Thus when Mr. Slutter was talking to the testator at the hospital during his son's final illness he told him "that he worked for the D. C. Fire Department . . . (and) even mentioned that the ambulance from his fire house had taken Mr. Joseph Lapiana, Jr. to the hospital and yet . . . (h)e turned around immediately after that (and asked): "What kind of work do you do?" (JA 48)

Based on the facts theretofore put into evidence, a hypothetical question was drawn up by counsel for the caveator-plaintiff and carefully reviewed by the judge in chambers. Thereafter the question was put, in open court, to Dr. John G. Lofft, a well qualified psychiatrist with heavy experience in caring for geriatric patients in mental hospitals (JA 52-53). The question was:

> "Assume, Doctor, that a man died in December, 1964; assume that this man, on January 1, 1958, loses by death his first wife when he is then 65 years of age; assume further that although no children were born of the first marriage, this man legally adopted his first wife's son some 34 years previously.
>
> "Assume that the adopted son, for whom the man has great affection, marries and, being unable to, with his wife, have children, in turn adopts a child on November 1, 1962.
>
> "Assume that the child is the recipient of attention and affection by his grandfather. Assume also that the

grandfather after losing his wife on New Years Day, 1958, remarries on November 24th, 1958.

"Assume that the man of whom we speak had little formal education and because of his birth and early years in a foreign country, Sicily, can speak only a little English; that he cannot read or write at all; that in spite of his foreign background and inability to read or write, he amassed a respectable fortune in excess of $100,000, composed, among other things, of stocks, real estate and mortgages; that in the fall of 1962, his adopted son is shown to have a terminal case of brain tumor and that all persons close to the son are aware of that medical fact; that in spite of the nature of the illness, the father continually expresses his thought to friends and relatives that his son will soon be well and that upon observing his son while on his death bed, he said to him, "Why are you not down at your office?" That when observed by some people, this man of whom we speak has tremors of the hand and his head shakes from side to side and that saliva is seen dripping from the corner of his mouth; that the man who in past years was a leader of and spokesman for his family, is seen in 1962 at the age of 70 in his son's sick room hunched in a chair in the company of family groups saying little or nothing; that prior to his marriage in 1958 and in the absence of ability to read or write, he drove his car frequently and obtained great pleasure from driving it; that after his second wife — that in the fall of 1962, his second wife drove him in the car; that shortly after his son's last illness, he was heard to express the following thought to a person: That he had just found out that he was 89 years old when in fact he was 71;

"That in his younger years he was proud and dominating in appearance and that at the time of his son's last illness and death, he appeared depressed, cried often, and had an uneven and unsteady gait;

"That although he showed by his acts and words his

great affection for his grandson, he made a bequest to him of $5,000 out of an estate of $100,000; and that the words of the will making such bequest are not legally binding;

"That during the period from 1959 to 1963, the man had experienced a substantial weight loss; that while at the hospital during his son's last illness, a friend of the family told him that he was a fireman and then went into detail about what he did, including the operation of ambulances, and so forth, and that when he finished his statement, and that the man said 'What do you do?'

"Based on the foregoing, Doctor, do you have an opinion based upon reasonable medical certainty as to whether or not the person mentioned was suffering from any form of mental disease or defect?"

THE COURT: When?

MR. SCHUETTE: At the time of the execution of the will in January of 1963.

The doctor replied that it was his opinion that "the individual described would have a diagnosis of senile dementia." (JA 53-54).

Doctor Lofft then described senile dementia:

> "Its a gradually progressive disorder in which there is progressive disintegration of the intellect. One would see this gradual progressive blunting and unresponsiveness of emotions and one sees in this disorder a gradual and progressive reduction in initiative and along with these changes in mental function, there would roughly parallel similar changes in the physical sphere, chiefly reduction in strength and reduction in vitality, and in this disorder one can discriminate it from the changes that one might find in the normal aging process, quite clear differentiation.
>
> "In other words, this disorder of senile dementia, or senile psychosis which is synonymous, there is

more than just a quantative impairment of some of the normal attributes of the mind. In fact there is really a much more rapid disorganization of personality, the total personality, than one would find in the normal decline or the normal changes of aging.

"When the diagnosis is made, it also suggests a prognostication or at least it suggests what the outcome will be because if a diagnosis is made, it implies a prediction of death within a period of just a few years. We usually consider the individual will decline in a gradual and progressive fashion, probably dying anywhere from three to five years after the first symptoms are noted.

"The onset of such a disorder is gradual and at first it would just seem to be acceleration of the normal process of aging but clearly it goes further than that as more symptoms develop. Memory is the first mental function hit and it is — it appears to be recent memory, that is memory of events of a few hours or within the past day, whereas the individual retains very much remote memory quite clearly.

"And along with the early signs would be the diminution of vitality and some narrowing of the interest range of the individual and along with blunting of emotions and some irritability coming into the behavior.

"Now, although the illness would commence in a rather insidious manner, the development of senile dementia progresses fairly evenly and fairly rapidly so that if you look at the individual again in, say, two to three years after these very early symptons appeared, one can note quite marked changes. At this point one would expect the individual to be quite slowed down, quite blunted in his emotional reaction, rather apathetic, and the physcial changes would be more pronounced. The individual would be more feeble and would have sort of a shrunken appearance, probably due to weight loss.

> "At this stage, the memory would be very much worse, and . . . it would show itself in a number of ways . . . here again the memory defect is covered up by accusations." (J.A. 55-56; Tr. 191)

Thereafter the doctor was asked what characteristics he saw in the hypothetical question which were characteristic of a man with senile dementia. The doctor replied:

> "[L]et's consider the physical changes first which I mentioned generally parallel the mental changes: The tremors of the body, the head, also the comment that was made about the saliva would suggest to me loss of muscular tone of the mouth, the unsteady gait could also be considered physical manifestation of this and also the considerable weight loss . . . (and) I include . . . (the) body tremor, hand tremor.
>
> "The most pronounced evidence that you presented would be in the area of the memory difficulty, the memory difficulty being severe enough for an individual to be actually disoriented about his age to the extent that you stated. One could understand, perhaps, an individual being in error by a few years about his age but the age difference here is — would suggest to me quite considerable confusion about one's age. The inability to recall this conversation with the ambulance driver, the fireman, is, I think a particularly good example of the recent memory loss that these individuals have, the inability to retain over a span of a few minutes facts that are presented earlier and being able to recall them or to recall the statements certainly would suggest an impairment of — impairments of recent memory that are found in this disorder, the denial of his son's illness in spite of evidence to the contrary, that the son was gravely ill, again suggests intellectual impairment, refusal to accept facts or to integrate new information. I would think the memory impairments would be the most pronounced evidence that would support this diagnosis." (JA 56, 57)

Based on the facts set forth in the hypothetical question the doctor said that he did not know whether the disease had progressed to the point where the testator knew, on the date that the alleged will was made, (1) what property he owned (J.A. 57), or (2) the natural objects of his bounty (JA 57, 58), or (3) what business he engaged in that day (JA 58).

The Sole Beneficiary. The sole beneficiary under the will was the testator's second wife, Patricia Lapiana, the caveatee-defendant herein. They had been married for four years at the time the will was allegedly drawn.

On November 18, 1958 — 10 days prior to their marriage — the testator and the sole beneficiary entered into an antenuptial agreement whereby they each agreed to limit their claim on the estate of the other. Executed when the testator was 66 and the sole beneficiary was 50, this agreement provided that the sole beneficiary would limit her claim on the estate of the testator to $20,000. (Caveator's Exhibit No. 1) The testator's estate at the trial was valued in excess of $100,000 (Tr. 160-167, JA 154). The sole beneficiary admitted signing the agreement (Tr. 171) and said that she "might have" read the agreement before she signed it (JA 171).

In 1959 or 1960 the testator advised a friend that "his wife would get just what she had when he married her." (JA 49)

The sole beneficiary was involved in the making of the alleged will. Thus at the trial when shown a will[1] and asked whether she had ever seen it, she declared:

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[1] The caveator-plaintiff was seeking to identify the will of the sole beneficiary's mother. This will was executed on a printed form the day before the mother died. The mother appears to have been illiterate as her will was signed with her mark. The caveatee-defendant was the sole beneficiary under this will which was proffered but not accepted into evidence (Plaintiff's Exhibit No. 3 for Identification). The mother's married daughter and two sons were excluded from the mother's $8,000 estate (Tr. 176-178).

"A. . . . That is the will and testimony my husband made.

"Q. Have you ever seen this before?

"A. I saw it about two months after *we* made it, occasionally." (Emphasis supplied. JA 52.)

The sole beneficiary procured the draftsman to act as her agent in the making of the will. In the draftsman's own words:

"She knew about the will. Mrs. Lapiana *had me come over there to . . . help make out the will . . .*" (Emphasis supplied. JA 58.)

The testator's view of the sole beneficiary, shortly after the will herein was allegedly drawn, came to light at the trial. Ruby Winslow, the testator's good friend and former bookkeeper recalled the following conversation with the testator at the son's funeral while standing before his casket:

"He said: 'I wish I was dead,' and I told him, I said 'Well, I'm surprised at you. You have so many friends, why would you want to die?'

"And he said 'No, I don't.'

"And I said 'You do. You have Pat, your wife.'

"And he says '*Oh, Pat don't care anything for me,*' and I said 'Well, why do you say that.'

"He says 'Well, *she only married me because she thought I had a little bit of money*'." (Emphasis supplied. JA 38.)

The sole beneficiary had a continuing relationship with the draftsman before and after the will herein was allegedly drawn and up to the time the will was offered for probate. Thus the draftsman, who had known the testator for 15 to 18 years, had been to the home of the alleged testator on "many occasions." After the testator's death he saw the sole beneficiary on *several occasions*. He saw her at his home; and he saw

her at her home although he didn't "know just when it was." (JA 58-59) He talked with her on the phone. He saw her when the alleged testator was laid out at the undertakers (JA 59) and prior to the time the will was offered for probate.

The draftsman said that he gave the will to the testator after its execution and that he "supposed" that Mrs. Lapiana "found" it after Mr. Lapiana passed away. (J.A. 59) The sole beneficiary recalls that she saw it about "two months after we made it, occasionally." (J.A. 52)

Evidence was adduced with respect to the relationship between the sole beneficiary and the alleged testator. It was shown that prior to his marriage the testator was "very dominating" with respect to the sole beneficiary. "Suddenly" the situation changed and the alleged testator became a "completely different person." He became "very docile, very amenable to any suggestions" the sole beneficiary might have and "she became the dominating influence." (JA 35) On the day the will was allegedly made an attorney[2] sought a burial spot for Joseph Lapiana, Jr. and discussed this with the sole beneficiary in the presence of the testator. The attorney indicated that "most of the conversation I had in the presence of Mr. Lapiana, Sr. was carried on by his wife." When the attorney told the alleged testator that he should have a will drawn "he sort of grunted and didn't indicate one way or another." (JA 40) The "grunt wasn't an audible yes or no." (JA 41)

At the 1962 Thanksgiving Day party the sole beneficiary "was doing most of the talking and he (the testator) was saying very little. In fact, he was sort of in a world of his own. Occasionally she would have to

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[2] Thomas Scott, Esq. Elsewhere in the trial, counsel for the caveator made a proffer of evidence that the caveator had called Mr. Scott approximately one year after the alleged will herein was drawn, to tell him of a phone call she had received from the testator indicating that he wanted "her to come right down... Becky, please come . . ." and that the testator was terrified." (Tr. 181)

turn to him and ask 'Don't you think that's right?' and he would more or less nod. . ." (JA 43-44).

He had been a "very dominating personality" but now "he was terribly depressed and he was very, very quiet." (J.A. 43) He was "quiet and subdued." (J.A. 44) "She was very domineering as far as I could see." Once when he was playing with Joseph Lapiana 3rd, she said 'let's go' and he seemed very reluctant to go. He wanted to stay, and she said 'Let's go,' and he got up and left." (J.A. 47) She was a woman who led her husband (J.A. 51) "He never asserted himself as he used to. He just never talked. When she got up, he got up and when she was sitting he was sitting with her. He acted like 'a little boy, a little boy being led'." (J.A. 51)

STATEMENT OF POINTS

1. The District Court erred as a matter of law in directing a verdict against the plaintiff-caveator on the issue as to whether the purported paper writing was the last will and testament of the decedent, Joseph Lapiana, Sr.

2. The District Court erred as a matter of law, with respect to the issue as to whether the purported will was executed and attested in due form as required by law, in (1) failing to make any finding whatsoever with respect to this issue at the conclusion of the caveator's case, and (2) failing to enter a verdict or otherwise dispose of the issue.

3. The District Court erred as a matter of law in directing a verdict against the plaintiff-caveator on the issue as to whether the decedent was of sound and disposing mind and capable of executing a valid deed or contract at the time of making, subscribing, or acknowledging the said paper writing.

4. The District Court erred as a matter of law in directing a verdict against the plaintiff-caveator on the issue as to whether the said

instrument was obtained or its execution or subscription procured from the decedent by fraud or deceit.

5. The District Court erred as a matter of law in directing a verdict against the plaintiff-caveator on the issue as to whether the paper writing was obtained or its execution procured by undue influence or duress or coercion.

SUMMARY OF ARGUMENT

I. Where in a will contest proceeding it is shown that the alleged will is not read to an illiterate testator at the time of its execution, the presumption that the testator "knows" its contents is rebutted when the caveator "attempts" to show testamentary incapacity or "offers" proof of fraud or undue influence, and this having been done by the caveator, these issues should be left to the jury and no verdict should be directed as to them.

II. The evidence in the instant case with respect to testamentary incapacity was so great in volume and quality that it was error for the trial court to direct a verdict with respect to this issue.

III. In a will contest where only one witness recalls that a ribbon was used to attach the two sheets of an alleged will offered for probate and only that witness can identify the first sheet which contained all the dispositive provisions and where the two sheets have no internal connection such as a running over of a sentence from one sheet to the other or a succession of paragraphs and where there are no identifying markings on the first sheet by either of the witnesses or the testator, the issue as to whether the will was executed and attested in due form as required by law should have been left to the jury.

IV. The evidence herein on mental incapacity and undue influence warranted sending these two issues to the jury and a verdict should not have been directed as to them.

V. In light of the applicable law and in view of all of the evidence adduced by the caveator it is submitted that reasonable men might differ as to whether the alleged will herein was, in fact, the will of Joseph Lapiana, Sr. and that, accordingly, it was error for the court below to direct a verdict against the caveator at the conclusion of her case.

VI. In a will contest where the issue of "due execution" was framed in the pre-trial order and at trial the alleged will was formally "proved" and admitted into evidence, and thereafter evidence was adduced which established that the testator could not read and that the will was not read to him at the time of its alleged execution, the court below erred in (1) failing to make any finding with respect to the issue of due execution at the conclusion of the contestant's case, and (2) failing to enter a verdict as to it or otherwise dispose of this issue.

ARGUMENT

I.

Where in a will contest proceeding it is shown that the alleged will is not read to an illiterate testator at the time of its execution, the presumption that the testator "knows" its contents is rebutted when the caveator "attempts" to show testamentary incapacity or "offers" proof of fraud or undue influence, and this having been done by the caveator, these issues should be left to the jury and no verdict should be directed as to them.

The instant case falls squarely within the guidelines of the United States Supreme Court decision of *Lipphard et al. v. Humphrey et al.*, 209 U.S. 264 (1908) which came up on appeal from the United States Court of Appeals for the District of Columbia Circuit. In that case it was shown:

> "The paper writing in controversy was witnessed by three credible witnesses, all of whom testified as witnesses for the caveatees. From their testimony it appeared that on April 27, 1898, Mrs. Loraine Lipphard brought the writing to the office of Miss Parker, one of

the attesting witnesses, with whom she had been long acquainted, and told her that it was her last will and testament, and that she wanted it attested by three witnesses. Two other witnesses with whom she was also acquainted, one of them for forty years, were procured, and all three being present, testatrix declared the paper writing to be her will and signed it by her mark thereto in the presence of all the witnesses, and they signed their names thereto as attesting witnesses in her presence. *The testatrix was at the time of sound mind and capable of making a valid deed or will. The will was not read in the presence of the witnesses,* and after the testatrix had subscribed her 'mark' and the will had been witnessed, it was handed to her and she took it away with her. After Mrs. Lipphard's death the will was produced by Rev. Mr. Meador (the named executor of the will) and given by him to an attorney, who lodged it in the office of the register of wills.

> "Evidence was adduced at the trial on behalf of the caveators that Mrs. Lipphard could not read or write." (Emphasis and parenthetical expression supplied.) *Id.* at 266.

Based on these facts the trial court sent the due execution issue to the jury which found in favor of the caveatees. The caveators appealed on the ground that there was a presumption that the testatrix did not know the contents of the will inasmuch as the testatrix could not read, and as the will was not read to her at the time of its execution.

The Supreme Court noted that the testatrix

> "was shown to be a woman of intelligence and business capacity; *she was in bodily and mental health and vigor when the instrument was executed; and there was no suggestion of fraud or undue influence in the case."* (Emphasis supplied.) *Id.* at 269.

and found for the caveatees.

The Supreme Court then said:

> "*Where there is evidence of the practice of fraud or undue influence, affirmative proof of knowledge of the contents may be necessary,* but not so in any other case, simply because of a presumption arising from inability to read. (Emphasis supplied.) *Id.* at 269.

and cited a number of authorities for this proposition including an Arkansas case involving an illiterate testatrix who had not had her will read to her at the time of its execution. *Guthrie v. Price,* 23 Ark. 407. The Supreme Court then quoted the concluding part of the opinion in that case:

> "It was proven that she could not read and it was not shown that the will was read to her at the time it was executed, but it may have been before. She produced the will herself, declared it to be her will, asked the witnesses to attest it as such, signed it by making her mark. She was a woman of good sense, particular about her business transactions, and manifested her usual soundness of mind at the time. *It is not shown that she was laboring under any feebleness of mind from disease, or approaching dissolution.* The provisions of her will appear to be reasonable. It is not shown that any imposition was practiced upon her, or that her sons had any agency in the preparation of the will. It was erroneous for the court to tell the jury as a matter of law that it being shown that she could not read it was necessary to prove that the will was read to her. They had the right to infer, from all of the circumstances, that she knew the contents of the will though, as shown by the authorities above quoted, in determining whether there was fraud or imposition in the execution of the will, the fact that she could not read, and that the will was not read to her, at the time it was signed, were circumstances to be considered by the jury." (Emphasis supplied.) *Id.* at 269 and 270.

The Supreme Court then went on to establish the guidelines for cases

involving illiterate testators who do not have their wills read to them at the time of execution, and applied these guidelines to the factual pattern in the *Lipphard* case. The Supreme Court said:

> "True, the presumption that a party signing a will by mark, or otherwise, knows its contents is not a conclusive presumption, but it must prevail *in the absence of proof of fraud, undue influence or want of testamentary capacity attending the execution of the will.* In the present case there was *no attempt* to show that the testatrix was not capable of making a valid deed or contract at the date of making the will; on the contrary, the evidence showed that she was a woman of energy, capacity, and intelligence. *Nor was any proof offered* of fraud or undue influence in the production of the will. Mrs. Lipphard brought the will, as we have said, to Miss Parker's office for the purpose of having it executed; she declared to the attesting witnesses the paper to which she made her mark to be her last will and testament. She was a person of sound mind at the date of the will, and it was executed and attested in the manner required by statute." (Emphasis supplied.) *Id.* at 270.

While the Supreme Court in *Lipphard* said that the trial court might well have directed a verdict because of "the presumption (that) where a will is properly signed and executed . . . the testator knows the contents" (*Id.* at 268 and 269), it infers that this presumption is overcome when "proof of fraud, undue influence or want of testamentary capacity attending the execution of the will" are adduced. (See *id.* supra.)

The Supreme Court further infers that in the case of an illiterate testator who does not have the will read to him at the time of its execution, an "attempt" to show testamentary incpacity or an "offer" of proof of fraud or undue influence, would be sufficient to rebut the presumption and *send the case to the jury* (See *id.* supra). As soon as the presumption is rebutted, by making such an attempt or offer, then the case should be

handled, the Supreme Court infers, in the manner set forth in the concluding part of the *Guthrie v. Price* opinion, favorably cited by the Supreme Court in *Lipphard:*

> "they (the jury) had the right to infer, from all of the circumstances, that she knew the contents of the will, *though, as shown by the authorities above quoted, in determining whether there was fraud or imposition in the execution of the will, the fact that she could not read, and that the will was not read to her, at the time it was signed, were circumstances to be considered by the jury.*" (Parenthetical expression and emphasis supplied.) *Id.* at 270.

In other words, the Supreme Court continues the long line of cases holding that a will of an illiterate testator which is not read to him *at the time of its execution,* should be very carefully scrutinized. "It is after all, an issue of fraud; and the question, as to whether or not the testator has been imposed on, is one of fact, to be left to the jury." *Clifton v. Murray* (1849) 7 Ga. 564, at 566. In *Clifton:*

> "The scrivener, Major Marsh, who wrote the will at the request of the testator, and under minute instructions, communicated to him for that purpose, swears that the paper propounded is the same which he drafted; that it is in exact conformity to the directions which he received from the mouth of the deceased, and that it has undergone no alteration; and this paper was executed by the testator in the presence of the witnesses, freely and without any constraint what ever, he declaring at the time, that he understood its provisions." *Id.* at 567.

Despite these facts, since the testator was illiterate and the will was not read to him at the time of the execution, the Court said:

> "The argument which has been submitted against the judgment of the Circuit Court, seems to my mind to assume a position which is not tenable, namely: that

the testator must *know* at the time he executed his will, that the paper before him is such. But this is not the issue. Is it in truth his will? *Devisavit vel non*? is the issue. Not whether the testator *knew* the instrument at the time of its execution to be his will, but whether *in fact* it was so? But even if it were otherwise, and it were necessary to show that the testator, at the time he signed the paper, knew that it was his will, is there not ample testimony to prove that the testator in this case had this knowledge? He himself expressly waived the reading of the will, when his attention was specially called to the subject, assigning as a reason, that he already knew its contents. Now it is admitted that the testator was sane, and it is not for us to conjecture how or in what manner he came to the possession of this knowledge. At any rate, this evidence was *most properly left to the jury; . . .*" (Except for the last emphasized phrase, all emphasis is that of the Court.) *Id.* at 567.

The central issue is whether the testator had knowledge of the contents of the will at the time of its execution. And, in *Clifton*, where an illiterate testator was not read the will at the time of its execution, the Court held that this question of knowledge of the will at the time of its execution, was "most properly" left to the jury.

While the *Clifton* case is more than 100 years old it is submitted that the law of wills has not changed appreciably in this area during that period. Thus the only change *Lipphard* has made in the rule followed in *Clifton* is to establish, in connection with the will of an illiterate testator which is not read to him at the time of its execution and which is otherwise properly signed and executed, a presumption that the testator "knows" its contents. And, once this presumption is rebutted by an attempt to show testamentary incapacity, or an offer of proof of fraud or undue influence, the Supreme Court in *Lipphard* implicitly recognizes

Clifton, by its favorable citation of *Guthrie*, supra, and the authorities there quoted, for the proposition that the case should then go to the jury.

In light of the foregoing, as in the instant case it was shown that the alleged will was not read to the illiterate testator at the time of its execution, and as the presumption that the testator knew its contents was rebutted when the caveator attempted to show testamentary incapacity and offered proof of fraud and undue influence, it is submitted that these issues should have been left to the jury and no verdict directed as to them.

II.

The evidence in the instant case with respect to testamentary incapacity was so great in volume and quality that it was error for the trial court to direct a verdict with respect to this issue.

The factual pattern in the instant case with respect to testamentary incapacity is similar in many respects to that set forth in the California case of *In Re Ivey's Estate*, 271 P. 559 (1928). In that case where, *inter alia*, the testatrix was physically weak and very feeble, her memory was failing, seemed to be in a daze, would mumble, was not coherent and clear, began to cry, often said "Oh, I wish I was dead, etc., it was held to be error for the trial court to grant a nonsuit. The Court of Appeals said:

> "It is manifest that, unless such facts tend to prove unsoundness of mind, they are wholly irrelevant to the issue, and consequently inadmissible in evidence. Unless relevant, they would be utterly useless, and have no legitimate place in the evidence. Being clearly pertinent to the inquiry, the conclusion is irresistible that they furnish some *substantial* evidence relating to the testamentary capacity of the testator. The authorities to which attention has been directed herein are to the effect that if *any substantial evidence* be adduced by the contestant, based upon which reasonable men

> might differ as to whether the testator was of sound mind, a motion for a nonsuit may not be legally granted. It would seem so clear as to be beyond controversy that one reasonable man might differ from another as to the effect of the evidence herein regarding the question of the unsoundness of mind of the testatrix. At least, the correct determination is not 'free from doubt.' Considering that according to the evidence, which, freed from inconsistencies or contradictions, shows conclusively that as to the testatrix each of the conditions referred to herein was present, both practiaally immediately before and, as well, closely following the time when the will was executed, we are constrained to hold that the requirements as to the quantum of evidence essential to the submission of the question to the jury were presented by the contestant, and, consequently, that the motion for the nonsuit should have been denied." (Emphasis supplied by the Court.) *Id.* at 563.

The District of Columbia has adopted the *substantial* evidence rule with respect to directed verdicts in will contest proceedings. *Betts v. Lonas*, 84 U.S. App. D.C. 206 (1948).

In a will contest proceeding, a motion for a directed verdict is governed by the same rules which govern such motions in other actions. The "most favorable evidence" rule applies. Thus the caveator herein is entitled to the benefit of all of the evidence in the case considered in the aspect most favorable to her, and with all reasonable inferences in her favor which may be properly drawn, and where there is *any* evidence fairly tending to prove the issue, although it may be opposed by a greater weight of the testimony, the question should be submitted to the jury. 95 C.J.S. 455. A verdict in this will contest proceeding should have been directed against the instant caveator *only* if the facts in evidence and the legitimate inferences therefrom were so strongly for the will as to leave no room for reasonable minds to differ. *Id.*

In view of the foregoing and in light of the volume and quality of evidence in the instant case with respect to testamentary incapacity (see the review thereof in the Statement of Facts, supra), it is submitted that it was error for the trial court to direct a verdict with respect to this issue.

III.

In a will contest proceeding where only one witness recalls that a ribbon was used to attach the two sheets of an alleged will offered for probate and only that witness can identify the first sheet which contained all the dispositive provisions and where the two sheets have no internal connection such as a running over of a sentence from one sheet to the other or a succession of paragraphs and where there are no identifying markings on the first sheet by either of the witnesses or the testator, the issue as to whether the will was executed and attested in due form as required by law should have been left to the jury.

The facts as to the nature of the alleged will itself in the instant case, are very similar to the alleged will offered for probate in the Pennsylvania case of *In re Baldwin Estate,* 55 A.2d 263. In that case three separate sheets of paper were rolled together with a rubber band around them; *the legacies were on sheets 1 and 2.* Sheet 3 contained a printed testimonium clause filled in and signed by the testator. The Court threw out the alleged will and would not permit it to probate on the ground that it was not signed at the end. In effect the Court was noting that there was no internal proof that the testator knew the contents of sheets 1 and 2.

In the instant case the evidence with respect to the external physical connection of Sheet 1 and Sheet 2 of the alleged will, is subject to substantial doubt, relying as it does *totally* on the testimony of the wit-

ness-draftsman[3] who was procured by the sole beneficiary who admitted to having participated in the making of the will.

The courts of the District of Columbia have been very circumspect with respect to the question of sufficient physical connection of sheets comprising an alleged will:

> "The requirements concerning subscribing witnesses certainly becomes less strict *if it be said* that the papers are sufficiently physically connected . . . In no other field of law should more care be taken over a decision to lessen requirements than in the field of wills where the introduction of fraud must be guarded against to a greater extent because of the fact that the lips of the main 'witness' (the testator) are sealed." (Emphasis supplied.) *In re Lee's Estate,* U.S. District Court for the District of Columbia (1948), 80 F. Supp. 293.

In light of the foregoing and while the trial court never made any formal disposition of the issue of due execution it is submitted that no verdict should be directed as to it and, at the very least, the issue should be left to the jury to decide.

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[3] "If he neither read it nor heard it read, *his saying that it was his will could amount only to this, that he had unbounded confidence in the person who drafted it, was willing blindly to accept any will which he might write. The fact of the signature is, of all those mentioned in the request, the only one that can be much depended on as a real fact. And that, by itself, as we have seen, will not do.*" (Emphasis supplied. *Hughes v. Meredith* (1858), 24 Ga. 325.)

IV.

The evidence herein on mental incapacity and undue influence warranted sending these two issues to the jury and a verdict should not have been directed as to them.

Where an attack upon a will is based upon *both* mental incapacity and undue influence, the evidence need not be as convincing as where only a charge of mental incapacity is made. *Smith v. Ridner*, 168 S.W.2d 559 at 560. Then only *slight circumstances* indicating undue influence are required. *Id.* And circumstantial evidence, without any direct evidence, may be enough to take the case to the jury. *Towles v. Pettus*, 12 So. 2d 357.

In considering the issue as to whether the instant alleged will was procured by the undue influence of the caveatee or the draftsman, it is noted that undue influence is closely allied to fraud, and when resorted to by a crafty person, its presence often becomes exceedingly difficult to detect. *Robinson v. Duval*, 27 App. D.C. 535, affirmed 28 S. Ct. 260, 207 U.S. 583. The essential elements of undue influence invalidating a will are (1) a person susceptible to such influence [testator was enfeebled and senile at the time of the making of the will]; (2) opportunity to exert such influence and effect the wrongful purpose [draftsman and sole beneficiary visited with one another before and after the alleged will was executed and before it was filed for probate; both had ample opportunity to exert an undue influence on the testator]; (3) a disposition to do so for an improper purpose [as noted supra the sole beneficiary, through the alleged will, increases her interest from $20,000 (the amount to which she was entitled under the antenuptial agreement executed four years before the will herein was allegedly drawn) to in excess of $100,000]; and (4) a result clearly showing the result of such influence [under alleged will namesake and sole grandson receives invalid precatory request that he get $5,000 when 18 for his education. Only mention in

will of sole child of testator, his son Joseph Lapiana, Jr. whom he had loved and cherished for more than 40 years, was an invalid cancellation of an alleged $1500 debt. Advanced in years and physically and mentally feeble, the testator had no assurances that he would survive his son]. *In re Raschi's Will,* 284 N.W. 571.

In light of the foregoing it is submitted that the issues of mental incapacity and undue influence both should have gone to the jury and that it was error for the trial court to direct a verdict with respect to these issues.

V.

In light of the applicable law and in view of all of the evidence adduced by the caveator it is submitted that reasonable men might differ as to whether the alleged will herein was, in fact, the will of Joseph Lapiana, Sr. and that, accordingly, it was error for the court below to direct a verdict against the caveator at the conclusion of her case.

If any substantial evidence is adduced by a caveator, based upon which reasonable men might differ, a motion for a directed verdict at the conclusion of the caveator's evidence may not be legally granted. The evidence must be considered in its aspect most favorable to the caveator. (See Argument II supra.) In these circumstances and in view of all of the evidence adduced herein including that establishing: (1) testator could not read or write (except his own signature); (2) alleged will was not read to the testator at the time of its execution; (3) testator was physically and mentally enfeebled (i.e. rambling and incoherent in his speech, like a little child, moody and quiet, subdued, very slow and uneven gait, tremor of head and hands, loose expression, saliva from side of mouth, dazed, unable to recall basic fact of conversation in which he was just engaged, and thought he was 89 when he in fact was 71) and a hypothetical individual with the testator's mental and physical charac-

teristics as adduced at the trial herein, was diagnosed, as of the time of the making of the alleged will, as having senile dementia (mental disorder involving the progressive disintegration of the intellect with rapid disorganization of personality involving loss of recent and remote memorty);(4) draftsman of will was procured by sole beneficiary; (5) sole beneficiary admitted to having participated in the making of the will; (6) through alleged will sole beneficiary would increase her claim on testator's estate from $20,000 to over $100,000 by its vitiation of an antenuptial agreement which she executed with the testator four years prior to the execution of the alleged will; (7) alleged will on two "form will" sheets with all dispositive provisions on the first sheet; no identifying markings (no initials, dates, circles or other markings by testator or witnesses) on first sheet; no one but draftsman could identify the first sheet (other witness to will had not heard will discussed and did not know what it contained); sheets held together with ribbon which form of attachment was recalled only by draftsman; residuary clause on second "signature" sheet not used; all of testator's personal and real property left to sole beneficiary in first dispositive clause on first sheet, invalidating subsequent bequests including a precatory request that the testator's sole grandchild and namesake receive $5,000 for his education at 18 (only mention in alleged will of testator's only child and namesake is an invalid cancellation of an alleged $1,500 debt); no running over of sentences or paragraphs from sheet 1 to sheet 2; and draftsman of the alleged will was a former law student; (8) testator did not have the will in his possession prior to its execution; (9) sole beneficiary who admitted to having made the will with someone else, had access to it two months after it was made and referred to it occasionally, had it in her possession after testator's death and had it filed for probate; and (10) draftsman and sole beneficiary visited with one another on several occasions before and after the execution of the alleged will, and after the testator's death and before the alleged will was offered for probate; it is submitted that reasonable

men might differ as to whether the alleged will herein was, in fact, the will of Joseph Lapiana, Sr. and that, accordingly, it was error for the court below to direct a verdict against the caveator at the conclusion of her case.

VI.

In a will contest where the issue of "due execution" was framed in the pre-trial order and at trial the alleged will was formally "proved" and admitted into evidence, and thereafter evidence was adduced which established that the testator could not read and that the will was not read to him at the time of its alleged execution, the court below erred in (1) failing to make any finding with respect to the issue of due execution at the conclusion of the contestant's case, and (2) failing to enter a verdict as to it or otherwise dispose of this issue.

The issue of due execution was framed in the pre-trial order. At trial the alleged will was "proved" and admitted into evidence. Thereafter evidence was adduced establishing that the testator could not read and that the alleged will was not read to him at the time of its execution. At the conclusion of the caveator's evidence the court below failed to make any finding with respect to the issue of due execution. In addition, it failed to enter a verdict as to it or to otherwise dispose of the issue. This was error as the caveator is entitled to know whether the question was decided according to the evidence or according to arbitrary or extralegal considerations.

This Court has held:

> "Findings of fact in case of review serve the purpose of apprising parties and the reviewing tribunal of the factual basis for the action of the court . . . so that it may be determined whether the case has been decided according to the evidence or according to arbitrary or extralegal considerations." *Saginaw Broadcasting Co. v. FTC*, 68 App. D.C. 282; 96 F.2d 554, cert. den.

As a general rule, the verdict in a case should be precise and definite, *responsive to the issues*, and supported by the evidence. And the failure of the court to find on a material issue *arising at the trial* ordinarily constitutes reversible error. *Appeal & Error*, 5B C.J.S. 1790 (b), at p. 63.

CONCLUSION

For the foregoing reasons, appellant respectfully urges this Court to reverse the judgment of the court below with instructions to decree that the purported paper writing dated January 14, 1963, was not a valid will of Joseph Lapiana, Sr., or, in the alternative, to order a new trial.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,085

REBECCA D. LAPIANA,

Appellant,

v.

PATRICIA LAPIANA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

On a caveat filed on behalf of the adopted grandson of the testator, issues of due execution, the will of the testator, testamentary capacity, undue influence, and fraud and deceit were framed for trial. On the testimony of the two attesting witnesses that the testator signed the will in their presence and they thereafter signed in the presence of each other and the testator and the statement of caveator's counsel that he had no evidence to offer on the execution of the will, the district court held the will had been duly executed and, upon the conclusion of caveator's case, directed a verdict for the caveatee with respect to the remaining issues.

In the opinion of the appellee, the questions presented are:

1. Whether testimony that one of the attesting witnesses did not recall the precise manner in which the two pages of the will were bound together, that testator could not read, and that the will was not read to him when he signed it, although it had been read to him previously on the same day, is sufficient evidence to go to the jury on the issue of due execution.

2. Whether generalized lay testimony of the testator's physical and mental condition which caveator's medical expert testified did not provide a basis for a conclusion with respect to testator's knowledge, at the time of the execution of the will, of (1) his property, (2) the natural objects of his bounty, and (3) the business he was engaged in, is sufficient evidence to go to the jury on the question of testamentary capacity.

3. Whether testimony that the testator's wife of approximately five years, who was the principal beneficiary of the will, had a dominating personality and called testator's close friend of more than fifteen years to assist testator in the drafting of the will, together with

the circumstances described in the prior questions, is sufficient evidence to go to the jury on the issues of undue influence and fraud where the uncontradicted evidence is that the wife was not present (1) when the testator discussed his dispositive desires with the scrivenor of the will, (2) when testator's directions as to the disposition of his property were incorporated in a formal document by the scrivenor and delivered to the testator, or (3) when the testator signed the will in the presence of the two persons who witnessed the will at his request.

INDEX

CITATIONS

CASES:

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* Cases chiefly relied on.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,085

REBECCA D. LAPIANA,

Appellant,

v.

PATRICIA LAPIANA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from a judgment of the district court sitting as a probate court dismissing the caveat filed by appellant as guardian *ad litem* for the testator's adoptive grandson against the will of Joseph Lapiana, Sr., who died on December 11, 1964 (J.A. 8). The caveat alleged improper execution of the will, lack of testamentary capacity,

undue influence, and fraud and deceit (J.A. 4,5). The court held that the will had been duly executed and, at the conclusion of the trial, directed a verdict in favor of the caveatee (hereinafter "appellee") on the issues of testamentary capacity, undue influence, and fraud and deceit on the ground that appellant had not presented a "scintilla of evidence to show lack of mental capacity, to show fraud or duress, or to show undue influence" (J.A. 63).

Appellant had been the wife of testator's son, Joseph Lapiana, Jr., who became seriously ill in the fall of 1962 (J.A. 41) and died on January 15, 1963 (J.A. 40). She and her husband formally adopted Joseph Lapiana, III, on whose behalf she filed the caveat, in November 1962, at about the time when surgery disclosed testator's son had a malignant brain tumor (J.A. 14). Testator's will was executed on January 14, 1963, the day before his son died (J.A. 2).

On January 14, 1963, Thomas B. Scott, an attorney for Mrs. Lapiana, Jr., the appellant (J.A. 40), called on testator for the purpose of inquiring whether Joseph, Jr., could be buried in a cemetary lot which testator owned (J.A. 40). Mr. Scott then advised testator "that in view of the fact that Joseph, Jr., was an adopted child * * * it would be to his interest to have a will drawn" (J.A. 40). On the same day, appellee requested Mr. Thomas J. Long, a real estate broker for nearly 50 years who had known testator between 15 to 18 years (J.A. 27) and had acted as his real estate broker (J.A. 61), to "come over" and to "help make out the will" (J.A. 58).[1]

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[1] This call to Long is the complete evidence of appellant's unfounded statement that "the sole beneficiary procured the draftsman to act as her agent in the making of the will." (App. Br. p. 14) Mr. Long's entire testimony with respect to acting "as her agent" is as follows (J.A. 58):

> Q. Did there come a time when you told Mrs. Patricia Lapiana about the execution of this will?
>
> A. She knew about the will. Mrs. Lapiana had me come over there to sit down and help make out the will; and when I came over, Mrs. Lapiana left. It wasn't anybody in the house but Mr. Lapiana and myself.

Long purchased a printed form of will (J.A. 59) at a neighborhood stationery store and went to testator's house (J.A. 58). When he arrived, appellee departed leaving Long and the testator alone (J.A. 58). Long took notes in long hand which he reviewed with the testator, transcribed the notes "and typed this will on a typewriter at my [Long's] home", and thereafter read the will over several times to the testator at his home (J.A. 28, 60). On the same day, unaccompanied by his wife, the testator alone walked over to the office of the Banks Realty Company a few blocks from his house, requested Long and Mrs. Minnie L. Banks who were in the office to be witnesses to his will, and affixed his signature while they were "standing right there watching him sign the will" (J.A. 27,28,29,62). The two witnesses then signed the will in the presence of the testator and each other (J.A. 29).[2]

The will was typed on the printed form purchased by Long consisting of two pages. The first page contained provisions disposing of all of the testator's property. It left all testator's real and personal property to his wife, describing the various types of personal property and specifically enumerating the real estate properties he owned. Testator requested that his "wife set aside the sum of Five Thousand Dollars ($5,000) which she should receive the interest therefrom until my grandson, Joseph Lapiana, 3rd, shall have reached the age of 18 years at which time this money ($5,000) will be available for his education. In the event of his death the money will revert to my wife." The will further cancelled "the debt of $1,500 which amount I advanced to my son, Joseph Lapiana, Jr.) and requested that "the sum of $500 be paid

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[2] Appellant asserts the "sole beneficiary was involved in the making of the alleged will" in reliance on her testimony that she saw it "about two months after we made it" (App. Br. 14). The testimony is uncontradicted that she left the house as soon as Long arrived and the will was drafted, formalized and executed without her presence or participation. The statement on which appellant relies obviously relates to her calling Long to come over to assist testator in formalizing the will.

to the Italian Catholic Church located in Dunkirk, New York, for Masses for the repose of my soul." All of these bequests appeared on the first page of the will. The second page contained a printed residuary clause, with the word "none" typed in the blank space for the beneficiary, the appointment of the appellee as executrix, the attestation clause, and the signatures of testator and the two witnesses.

At the trial, the caveatee as proponent of the will, proved its execution in the manner previously described through the testimony of the two attesting witnesses, *supra*. On cross-examination, Long testified that the document offered for probate was the will that was executed (J.A. 27, 60). Mrs. Banks, on cross-examination, testified that the two pages of the will were fastened together but that she did not give too much attention as to how this was accomplished (J.A. 30). The Court personally interrogated Mr. Long and Mrs. Banks concerning the signing of the will (J.A. 28) and then asked appellant's counsel if he had any testimony to offer with regard to its execution (J.A. 31). Upon receiving a negative reply, the Court held "that due execution of the will has been proved" (J.A. 31). Responding to questioning by appellant's counsel as to the bequests, Mr. Long stated, "Well, that is the will. That is the way he wanted it written" (J.A. 60).

On the issue of the testator's testamentary capacity, appellant offered testimony of lay witnesses concerning a number of physical infirmities, a depressed, uneven and withdrawn emotional condition, and occasional lapses of memory and understanding. These witnesses gave no testimony relating to whether the testator was aware of the property he owned, knew the members of his immediate family, or understood the business in which he was engaged in his daily activities or when he executed his will. It appeared from the testimony of these witnesses that the testator often engaged in his daily affairs alone, going to church, visiting his son, and dropping in at the Banks Real Estate

(JA 36, 49, 22). A psychiatrist called by appellant, who did not know and had never examined the testator (JA 57), testified in response to a hypothetical question based upon the foregoing testimony, that "the individual described would have a diagnosis of senile dementia" (J.A. 54). He defined this as a disorder in which there is a progressive disintegration of the intellect, a gradual, progressive blunting of the emotions, and a gradual, progressive reduction in initiative, mental function, strength and vitality (J.A. 55). He admitted, however, that he could not say with reasonable medical certainty whether the testator, on the day he executed his will, would know the property he owned, the natural objects of his bounty, or the nature of the business in which he was then engaged (J.A. 57, 58).

On the remaining issues, appellant relied on the following testimony. Testator's wife had requested Long to come to their house to draft the will (J.A. 58). The testator could not read and the will was not read to him at the time he signed it. His wife testified that she first saw the will about two months "after we made it". One of the attesting witnesses did not recall the precise manner in which the two pages of the will was fastened together. Long had visited the testator and his wife at their home on many occasions and, after the testator's death, Long saw the testator's wife on several occasions at his home and at her home and had talked to her on the telephone (JA 58, 59). Under an antenuptial agreement appellant would have received less than she did under the will. At his son's funeral testator had said that his wife did not care for him and married him because she thought he had some money (J.A. 38). Prior to their marriage the testator was very dominating with respect to his wife but that thereafter this changed and his wife became the dominating influence, and he became quiet, docile, and subdued during his son's terminal illness.

Appellant's claim that "the sole beneficiary had a continuing relationship with the draftsman [Long] before and after the will was offered

for probate" (App. Br. p. 14) is based entirely on the following testimony (J.A. 58-59):

> Q. Have you been to the home of Mr. and Mrs. Lapiana, Sr. on a number of occasions?
> A. Many times, yes.
> Q. Are you an old friend of Mr. Lapiana?
> A. I have known Joe for about, I'd say, between 15 and 18 years, I think about around 1947, I guess.
> Q. Did you go to his funeral?
> A. Yes, I went to the church. I didn't go to the cemetery.
> Q. Did you go to the funeral parlor?
> A. I did.
> Q. After Mr. Lapiana, Sr. died, you saw — did you see Patricia Lapiana on several occasions?
> A. Yes.
> Q. Did you see her at your home?
> A. My home?
> Q. Yes.
> A. She'd been over my house but I don't know just when it was.
> Q. Did you see her at her home?
> A. Yes, I saw her at her home.
> Q. Did you see her at your office?
> A. No.
> Q. Did you talk to her on the phone?
> A. Yes.
> Q. Did you call her or did she call you?
> A. I may have called her. She may have called me. I don't remember.
> Q. Was this shortly after Mr. Lapiana, Sr. died?
> A. Well, sometime afterward, I suppose.
> Q. Was it before Christmas?
> A. I didn't keep any diary. I wouldn't be able to tell you that.
> Q. When was the first time you saw Patricia Lapiana after Joseph Lapiana, Sr. died?
> A. I saw her when he was laid out at Hines — at the undertaker's.

At the conclusion of caveator's case, interpreting "the evidence most favorably to the plaintiff or caveator" and giving "the plaintiff the benefit of all inferences which may reasonably be drawn from that evidence," the Court let stand its earlier finding that due execution of the will had been proved, held there was not sufficient evidence from which reasonable men could find lack of testamentary capacity, fraud or deceit, or undue influence, and directed a verdict in favor of the caveatee on these issues and on the issue whether the will offered was the last will and testament of the testator (J.A. 63, 64).

SUMMARY OF ARGUMENT

The testimony of the two subscribing witnesses established that the will was executed in accordance with the required formalities (D.C. Code, Sec. 19-103). The district court properly held, therefore, when caveator offered no evidence in this connection, that due execution of the will had been proved. Caveator had the burden of proof to overcome the presumption of regularity and validity of a will executed in accordance with the statutory formalities. *Brosnan v. Brosnan,* 263 U.S. 345, 347; *Leach v. Burr,* 188 U.S. 512, 515; *Mann v. Cornish,* 87 U.S. App. D.C. 110, 185 F.2d 423; *Betts v. Lonas,* 84 U.S. App. D.C. 206 172 F.2d 750; *Brooke v. Barnes,* 61 App. D.C. 161, 162; 58 F.2d 887, 888. And to meet this burden, the opponent of the will cannot rely upon an evidentiary "attempt" or an "offer" to demonstrate its invalidity as appellant argues. "More than suspicion * * * is required." *Beyer v. LeFevre,* 18 U.S. 114, 125, 126; *Mann v. Cornish, supra; Brooke v. Barnes, supra,* Substantial evidence of an invalidating factor is a prerequisite to submission of the case to a jury. *Brosnan v. Brosnan,* 263 U.S. 345, 347; *Galloway v. United States,* 319 U.S. 372, 395; *Pollard v. Hawfield,* 83 App. D.C. 374, 170 F.2d 170, certiorari denied 336 U.S. 909.

Appellant was not entitled to have submitted to the jury the issues whether the will was duly executed or was the will of the testator because the contrary evidence, if any, was insubstantial. Certainly, the presumption of regularity cannot be overcome by the testimony of one attesting witness that she could not recall the precise manner in which the will which she signed two years earlier had been fastened together. Nor does evidence of the testator's inability to read and not having the will read to him at the time of its execution present a jury question. "There is a presumption that a testator knows the contents of a properly executed will; his inability to read does not create a contrary presumption that he does not know the contents. *Lipphard v. Humphrey,* 1908, 209 U.S. 264, 268-269". *Mann v. Cornish,* 87 U.S. App. D.C. 110, 111, n. 4, 185 F.2d 423. Moreover, there was uncontradicted evidence the testator knew the contents of the will and that it had been read to him on the day that it had been executed.

On the issue of testamentary capacity, appellant introduced generalized testimony of several lay witnesses with respect to various aspects of testator's physical and mental condition. But this evidence did not purport to negate any of the three specific aspects of testamentary capacity, namely, "sufficient mind and memory to know * * * (1) what property he owns in a general way; (2) the natural objects of his bounty and his relation to them; and (3) the nature of the instrument he is executing". *Thompson v. Smith,* 70 App. D.C. 65, 72, 103 F.2d 936; *Lewis v. American Security & Trust Co.,* 53 App. D.C. 258, 261, 289 Fed. 916, 919. Appellant's medical expert testified that the evidence adduced of testator's physical and mental condition did not provide the basis for an informed medical judgment on any of the three elements of testamentary capacity. Obviously, appellant did not offer sufficient evidence to preclude a directed verdict on the issue of testamentary capacity.

The requirements of proof are similarly exacting with respect to undue influence or fraud in that it must show that the undue influence

of fraud operated to destroy the testator's "free agency" so that the will does not express the testator's wishes. *MacKall v. MacKall,* 135 U.S. 165. ("There was no evidence to show that there was no free agency, that his (testator's) will on the contrary was overborne by excessive importunity, imposition, or fraud, so that the will does not in fact express his wishes as to the disposition of his property.") The disposition of property by testator was not unnatural. As the district court stated, "You can't infer undue influence, any fraud, or lack of testamentary capacity from the terms of this will" (J.A. 63). The evidence affirmatively showed that the will carried out testator's wishes, and there was no evidence to the contrary sufficient to support a jury verdict against the will.

ARGUMENT

I

The Paper Writing, Dated January 14, 1963, Was the Last Will and Testament of the Testator and Was Duly Executed and Attested as Required by Law

The testimony is uncontradicted that the testator signed the document which he declared to be his will in the presence of two persons who then signed the will as witnesses in the presence of the testator and each other (J.A. 29, *supra*). This testimony established that the will was duly executed and attested in the manner required by statute. D.C. Code, § 19-103. Accordingly, when appellant's counsel stated that he had no testimony to offer with regard to its execution, the district court properly held "that due execution of the will has been proved" (J.A. 31, *supra*).

Appellant contends that the district court erred in failing to make any finding with respect to due execution at the conclusion of the caveator's case, in not submitting the question to the jury, and in failing

to enter a verdict with respect to or otherwise dispose of the issue. She argues that because only one witness recalled that the two pages of the will were bound together by a ribbon the issue of due execution should have been left to the jury and that the evidence, introduced after the will had been proved, that the testator could not read and that the will had not been read to him at the time of its execution required a redetermination of the previously decided issue of due execution.

The issue of due execution was correctly decided by the district court on the testimony of the two attesting witnesses and counsel's statement that he had no testimony to offer with respect to the will's execution. No question was raised with respect to the formalities of the execution of the will. Since appellant introduced no evidence to undermine or cast doubt upon the determination of due execution, it was unnecessary to enter a verdict with respect to this issue at the conclusion of the caveator's case and it would have been error, in the absence of any evidence of improper execution, to submit this issue for the speculation of the jury.

The law in the District of Columbia is that there is a presumption of regularity of execution of a will and this presumption can only be defeated by clear and convincing testimony to the contrary. *Betts v. Lomas*, 84 U.S. App. D.C. 206, 172 F.2d 750.[3] Certainly the evidence with respect to the form of the will at the time of execution provides no basis for submitting the question to the jury. Both attesting witnesses testified that the will introduced, consisting of two pages bound together, was the will as executed. One witness was not interrogated as to the manner in which it was bound; the other witness testified that the two pages were fastened together but that she did not pay attention to and did not recall the precise manner in which this was

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[3] In this case, a jury verdict of improper execution of the will in the light of evidence that the testator signed the will in an adjoining room was set aside.

done. One of the witnesses who was the testator's scrivenor testified that he typed the document which the testator signed and to which he and the other subscribing witness attested (J.A. 27). With respect to this document (Appellee's Ex. 1), the witness also testified "that is the will. That is the way he wanted it written." (J.A. 60) There was no evidence whatever and not even the slightest suggestion that the first page of the will had ever been in any different form, that there had been any substitution of pages, or that when the testator made his will he intended to dispose of his property in a manner different from that provided on the first page of the will. There was not only no clear and convincing testimony but no testimony at all to overcome the presumption of regularity of the execution of the will or to justify the submission of this issue to the jury.[4]

Similarly, the evidence that the testator could not read and that the will was not read to him when he signed it did not require a redetermination of the issue of due execution at the close of caveator's case. There is a presumption of validity of a properly executed will and that a testator knows the contents thereof. *Mann v. Cornish,* 87 U.S. App. D.C. 110, 111, 185 F.2d 423; *Lipphard v. Humphrey*, 209 U.S. 264, 268, 269; *Betts v. Lonas,* 84 U.S. App. D.C. 206, 172 F.2d 750. And this presumption persists even where the testator is illiterate and the will

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[4] The cases cited by appellant with respect to the physical form of the will at the time of its execution are not relevant here. In *In re Baldwin Estate*, 55 A. (2d) 263 (Pa.), *three separate sheets* were found rolled together contained by a rubber band. When opened, a shorter sheet with signature, not even similar to the printed sheet forms of the other pages, fell to floor. The question was whether the will was signed at the end as required by statute and the court properly did not allow that will to be probated. In *In re Lee's Estate*, 80 F. Supp. 293, a writing was folded and sealed in an envelope on which was inscribed "My last will and testament" followed by witnesses' signatures not attached to the paper purporting to be the will. The court properly held the witnesses must sign on same sheet of paper as the signature of the testator or on a sheet physically connected to the will.

is not read to him at the time of its execution. *Lipphard v. Humphrey, supra.*

In *Mann v. Cornish,* 87 U.S. App. D.C. 110, 111, 185 F.2d 423, the court stated "Thus, it is not enough to point to the fact that the testator could not read" pointing out, "There is a presumption that a testator knows the contents of a properly executed will; his inability to read does not create a contrary presumption that he does not know the contents". In the present case, of course, this presumption was fortified by the uncontradicted and unchallenged testimony of the scrivenor of the will, a disinterested witness, that the testator knew its contents.

Appellant contends, however, in purported reliance upon *Lipphard, supra,* that "an 'attempt' to show testamentary incapacity or an 'offer' of proof of fraud or undue influence" rebuts this presumption and creates an issue for the jury (App. Br. p. 21). For this argument, appellant relies on the language in the Supreme Court's opinion that "the presumption that a party signing a will by mark, or otherwise, knows its contents is not a conclusive presumption, but it must prevail in the absence of proof of fraud, undue influence or want of testamentary capacity attending the execution of the will." The Court continued that "there was no attempt to show" want of testamentary capacity. "Nor was any proof offered of fraud or undue influence in the production of the will". (App. Br. p. 21) The Supreme Court stated that the presumtion would have justified a directed verdict by the trial court (209 U.S. at 268-269) and upheld a judgment in favor of the caveatee.

Only by distorting its plain meaning can the Supreme Court's language be construed to support appellant's claim that "an 'attempt' to show testamentary incapacity or an 'offer' of proof of fraud or undue influence, would be sufficient to rebut the presumption and send the case to the jury" (App. Br. p. 21). Reason would be reduced to absurdity if an ineffectual "attempt" to prove lack of testamentary capacity or

an "offer" of unsubstantial evidence to prove fraud destroyed the presumption. The obvious import of the opinion is that the presumption of validity prevails unless substantial evidence of testamentary incapacity fraud, or undue influence is introduced.[5] The insufficiency of appellant's evidence in these respects is discussed hereafter. But these are other issues and do not affect the separate issue of "due execution".[6]

II

The District Court Properly Directed a Verdict for Caveatee on the Issue of Testamentary Capacity

In the District of Columbia where a caveator challenges the mental capacity of a testator in opposing the probate of a will, the burden of proof on the issue of mental capacity is on the caveator. *Brosnan v. Brosnan,*[7] 263 U.S. 345, 347, 348; *Leach v. Burr,* 188 U.S. 510, 516.

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[5] There is nothing in *Guthrie v. Price*, 23 Ark. 207, or *Clifton v. Murray*, 7 Ga. 564, to suggest that an issue may be submitted to the jury on less than substantial evidence. "More than a suspicion * * * is required." *Mann v. Cornish*, *supra*.

[6] Even if the district court should have reiterated its determination of the issue of "due execution" by directing a verdict at the close of caveator's case, its failure to do so would not require reversal. 5 Moore, *Federal Practice* (1964 ed.), p. 2207, states:

> When a party fails to make a request to the court to submit an issue and the Court omits to make an express finding, the rule goes further to support judgment on special verdicts by implying a finding in accordance with the judgment entered.

The district court directed the jury to find that the instant will was the last will and testament of testator (Issue Number 4, J.A. 64). There was no evidence that testator ever made a different will. Had there been a technical error in that there was not a similar direction with respect to the issue of "due execution", appellant should have challenged the omission with respect to this issue while the jury was present. Failure to do so would amount to invited error (1A Moore, *Federal Practice*, pp. 3509, *et seq.*) and would provide no ground for reversal. 5 C.J.S. Appeal and Error, 1501, 1560(c), 1853; *Alabama Great Southern R. Co. v. Johnson*, 140 F.2d 968, 971 (C.A. 5); *United States v. Wurtobough*, 140 F.2d 534, 537 (C.A. 5); *Farmouth v. Tri States*, 271 F.2d 728, 737 (C.A. 5).

[7] Cited by this Court in *Mann v. Cornish*, 87 U.S. App. D.C. 110, 111, 185 F.2d 423.

Brosnan v. Brosnan, supra, pointed out (p. 348) with reference to the question of mental capacity, "Upon questions of this kind submitted to the jury the burden of proof, in this District, at least, is on the caveators. *Dunlop v. Peters,* 1 Cranch C.C. 403, Fed. Cas. No. 4, 168. See also *Higgins v. Carlton,* 28 Md. 115, 143; *Tyson v. Tyson,* 37 Md. 567. The caveators in the present case failed to sustain this burden and we are of the opinion that *the trial court did not err in directing a verdict against them.* The judgment is affirmed." (Emphasis supplied.) And at p. 349, the Court said, " * * * this rule as to burden of proof rests upon the ancient presumption in reference to sanity. *Higgins v. Carlton, supra,* p. 141."

Appellant's evidence that testator was not of sound and disposing mind consisted exclusively of testimony of lay witnesses as to physical infirmities, emotional manifestations, and occasional mental lapses, and the testimony of a psychiatrist who had never seen or examined testator (J.A. 57), based upon a hypothetical question, that testator would have a diagnosis of senile dementia (J.A. 54), which he defined as a progressive disintegration of the intellect, emotional responses, and physical well-being (J.A. 55). When asked whether he could say with reasonable medical certainty whether it would be possible for testator to know on the day he executed the will, the property he owned, the natural objects of his bounty, or the business he was engaged in, the psychiatrist answered with respect to each of the three subjects, "No, I could not" (J.A. 57, 58).

It is clear that the generalized evidence presented by appellant with respect to testator's physical and mental condition does not meet the well-established requirement of evidence relating to the specific tests of testamentary capacity. In *Thompson v. Smith,* 70 App. D.C. 65, 72, 103 F.2d 936, the Court stated:

> That neither age, sickness, nor extreme debility will affect the capacity of a person to make a valid will, if he retains

> sufficient mind and memory to know * * * (1) what property he owns in a general way; (2) the person or persons who would be the natural objects of his bounty and his relation to them; and (3) the nature of the instrument he is executing; * * * [citing *Lewis v. American Security and Trust Co.*, 1923, 53 App. D.C. 258, 289 Fed. 916 (at p. 261, 289 Fed. at p. 919)].

The rule in the District of Columbia is stated by Mersch, *Probate Practice in D.C.* (2d ed.), Sec. 721, as follows:

> To make a valid will it is not necessary that the testator should be endowed with a high order of intellect, or even an intellect measuring up to the ordinary standards of mankind. Nor is it necessary to the making of a valid will that the party should have a perfect memory, and that his mind should be wholly unimpaired by age, sickness or other infirmities. If the party possesses memory and mind enough to know what property he owns and desires to dispose of, and the person or persons to whom he intends to give it, and the manner in which he wishes it applied by such person, and, generally, fully understands his purposes and the business he is engaged in, in so disposing of his property, he is in contemplation of law, of sound and disposing mind.

None of appellant's evidence related to testator's awareness of the property he owned, the persons he would be disposed to favor at the time of the execution of the will, or the fact that he was drafting a will. Moreover, as seen, her expert witness affirmatively testified that it would not be possible to determine with reasonable medical certainty from the evidence she adduced testator's understanding of these matters.

Enfeebled physical condition *may* be considered as some evidence on the question of testamentary capacity. *In re Cottrills Estate*, 39 F. Supp. 689, *Barone v. Williams*, 91 App. D.C. 74, 199 F.2d 89. But neither old age nor debility is necessarily a yardstick of mental capacity

(*Sellers v. Qualls*, 110 A.2d 73, 206 Md. 58), and neither old age nor infirmities, including untidy habits, partial loss of memory, inability to recognize an acquaintance, nor incoherent speech will deprive persons of their right to dispose of their property. *Cleland v. Peters*, 73 F. Supp. 769 (Pa.); *In re Higbee's Estate*, 75 A.2d 599, 365 Pa. 381; *In re Farmer's Estate*, 123 A.2d 630, 385 Pa. 486.

In *Leach v. Burr*, 188 U.S. at 510-511, 515, the court recounted that "seven physicians were called, who, upon a hypothetical question, substantially concurred that it was contrary to their experiences and reading that a man 73 years of age, dying of acute pneumonia, should have testamentary capacity between three and four hours before death" when the will was drawn.[8] A verdict directed by the trial court upholding the will was sustained because the evidence showed testator knew what he was doing when he made the will even though he was extremely ill.

In *Estate of Casarotti*, 184 Cal. 73, 192 P. 1085, 1087, the court declared, "It must be borne in mind that it is not every weakness and impairment of the faculties of the testator that will invalidate a will. Even where a testator is feeble in health, suffering under disease and aged and infirm, yet if he was of sufficiently sound mind to be capable of understanding the nature and situation of his property and of disposing thereto intelligently, without any delusions affecting his action, he had sufficient capacity to make a will." A similar view was expressed by the same court in an earlier case: " * * * Thus the wills of aged and infirm people, of people sick in mind as well as in body, are always upheld, if, notwithstanding their enfeeblement, testamentary

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[8] The court noted that testator's own physician and some other witnesses were available but not called. In the instant case, testator had periodically been going to doctors whose names were freely given at the trial by appellee, Mrs. Pat Lapiana, when called by caveator. (J.A. 52). No such doctor was called to testify by caveator.

capacity is shown." In *Estate of Chevalier*, 159 Cal. 161, 168, 169; 113 P. 130, 133.

In *In re Arnold Estate*, 107 P.2d 25, 32, 33, where three doctors were of the opinion that testator was of "unsound mind in a medical sense" (p. 32), the court stated:

> It is well settled that mere proof of a mental derangement or even of insanity in a medical sense is not sufficient to invalidate a will, but the contestant is required to go further and prove either such a complete mental degeneration as denotes utter incapacity to know and understand those things which the law prescribes as essential to the making of a will, or the existence of a specific instance delusion which affected the making of the will in question.
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> * * * Absolutely no showing was made that the testator at the time of executing his will was not in the possession of sufficient mental capacity to understand the nature of his act, the extent and character of his property, and the relationship of persons who were the natural objects of his bounty. If a person has sufficient mental capacity to know and understand these three requirements, he is possessed of sufficient mental capacity to make a will disposing of his estate. Estate of Perkins, 195 Cal. 699, 703, 235 P. 45: Estate of Shay, supra, 196 Cal. 355, 361, 237 P. 1079; Estate of Sexton, 199 Cal. 759, 764, 251 P. 778.

In the case of *In re Hamburgers Estate*, 126 Cal. App. 455, 14 P. 2d 802, 805, a mental and nerve specialist testified that the testator "was of unsound mind," but the court pointed out (p. 805) that this medical opinion did not relate to the question of the mental condition required to execute a legal testamentary document. With respect to the testimony of another medical expert of a mental impairment, the court stated that "giving to the evidence under the circumstances of the nonsuit, as we must, the fullest weight to which it is entitled, it is but a declaration of the belief of the physician that from a medical

standpoint she was insane. It is not accompanied nor followed by any evidence showing the extent or nature of the insanity, and, as hereinbefore pointed out, the insanity which the physician believed he had could have well co-existed with full testamentary capacity * * * ."

Not only did appellant herein fall far short of presenting substantial evidence, but the uncontradicted and unchallenged evidence affirmatively established the necessary elements of testator's testamentary capacity. The will described and disposed of all of testator's assets to the natural objects of his bounty. It provided for cancelling his son's debt of $1500. It requested that $5000 be set aside for his grandon's education. It requested $500 to be paid to the Italian Catholic Church in Dunkirk, New York, for masses in testator's behalf. It specifically enumerated the real estate parcels he owned and devised and it bequeathed his personal property "which consists of cash in bank and in building and loan associations, all stocks, bonds, and trust notes. All furniture and household goods, also all jewelry * * * , to my beloved wife Patricia Lapiana (Pat)" whom he appointed his executrix (Caveatees Ex. 1, J.A. 1). It did not mention appellant with whom testator had become irritable (J.A. 35).

The manner in which testator himself, alone, dictated the will to Long, went over Long's notes of his dictation, examined the typed will, the manner in which he went alone to the Banks office and arranged for the witnesses to witness his signature, stated the instant will was his will (pp. 3, 4, *infra*), and the clear dispositive provisions of the will itself, showed he knew what he was doing and intended to do just that. All of the requirements of capacity to make his will were met as demonstrated by the contents of the will itself and by the testimony of Mr. Long and Mrs. Banks that the testator requested them to witness his will.

In the District of Columbia, it has been held that where the fixed purpose of the testator is stated in rational language, indicating no want

of knowledge or memory in respect of his estate, his family, or the ordinary natural objects of his bounty, the mere fact that he has exercised his lawful power to disappoint the reasonable expectations of those nearest to him, and the natural and proper objects of his bounty in the opinion of the community, is not to be regarded as unreasonable in the sense of evidencing mental incapacity. *Morgan v. Adams*, 29 App. D.C. 198, error dismissed 211 U.S. 627. See also, *Thomas v. Young*, 57 App. D.C. 282, 22 F.2d 588.

No evidence at all in this case, direct or by inference, even tended to show in any way that testator (1) did not know his properties or possessions; (2) the object of his bounty; and (3) that in making his will he did not know what he was doing. Had a jury found to the contrary, it is clear the duty of the trial court would have required him to set such a verdict aside.

In support of her argument that the question of testamentary capacity should have been submitted to the jury, the appellant cites *In re Ivey's Estate* (Cal.), 271 P. 559.[9] In the *Ivey's* case, the court held that the facts that were adduced *must have tended* to show an unsoundness of mind *otherwise they would have been inadmissible* and, therefore, it reasoned, furnished substantial evidence to defeat a nonsuit. Although the court purported to apply the substantial evidence rule, the logic of its reasoning is that any admissible evidence, even a scintilla, is substantial evidence sufficient to present a jury question. This case has been criticized by the courts in California. In *Carew v. RKO Radio Pictures, Inc.*, 43 F. Supp. 199, 200 (D.C. Cal.), the court mentioning the *Ivey's* case stated the United States courts have never adopted the

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[9] Appellant also cites *Betts v. Lonas*, 84 U.S. App. D.C. 206, for the substantial evidence rule in the District of Columbia with respect to directed verdicts and 95 C.J.S. 445 for the most favorable inferences rule. These rules were applied by the district court in granting a directed verdict herein.

scintilla rule, and "with us the rule is that there must be substantial evidence before the defendant is required to undertake a defense." And in *Estate of Hamburger, supra,* 126 Cal. App. 455, 14 P.2d 802, 805, the court stated that there were statements in the *Ivey's* case "with which we do not entirely agree" and that "substantial testimony" of testamentary incapacity was necessary to prevent a nonsuit.

The scintilla rule is held enough in some states, but not in the District of Columbia. Appellant offered no substantial evidence to show testator's testamentary incapacity and the court properly directed a verdict on this issue.

III

Appellant Introduced No Evidence of Fraud or Undue Influence and the District Court Properly Directed a Verdict in Favor of Caveatee on These Issues

Since a duly executed will is presumed to be valid, substantial evidence of fraud or undue influence must be presented to create an issue for the jury in a will contest in the District of Columbia. In accordance with the rule generally applicable in jury trials,[10] the jury will not be permitted to conjecture or speculate on the basis of circumstances which create a mere suspicion. In *Mann v. Cornish,* 87 U.S. App. D.C. 110, 111, 185 F.2d 423, this Court stated, "The burden of proof has long rested upon those who allege fraud and undue influence in their attempts to set aside wills which have been properly executed [citing *Brooke v. Barnes,* 61 App. D.C. 161, 162, 58 F.2d 887, 888; cf. *Towson v. Moore,* 11 App. D.C. 377, 381, affirmed 173 U.S. 16, 24, 19 S.Ct. 332;

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[10] "The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *Galloway v. United States,* 319 U.S. 372, 395.

Brosnan v. Brosnan, 263 U.S. 345, 347, *et seq.; Leach v. Burr*, 188 U.S. 510, 516]". The Court continued: "More than suspicion is required", citing *Beyer v. LeFevre*, 186 U.S. 114, 125-126; *Palmer v. Strohecker*, 60 App. D.C. 312, 53 F.2d 924; *Brooke v. Barnes, supra*, at 884.

The requirement of substantial evidence is illustrated in *Pollard v. Hawfield*, 83 U.S. App. D.C. 374, 170 F.2d 170, certiorari denied 336 U.S. 909, rehearing denied 363 U.S. 924, where this Court sustained a directed verdict on the issue of fraud and deceit in a contested will case, stating, "After consideration of all the portions of the evidence called to our attention by this appellant, there was no evidence of fraud sufficient to justify the submission of that issue to the jury. From the evidence submitted, no reasonable juror could have found otherwise than that there was no fraud exercised by the appellees * * *. In fact, the submission of that issue to the jury without some evidence of fraud would itself have been error." The substantial evidence test to justify submission of a case to the jury was reiterated in *Hawley v. Alaska Steamship*, 236 F.2d 307, 309. "There must be substantial evidence offered by plaintiff to justify submitting the case to the jury." In *Gunning v. Cooley*, 281 U.S. 90, 94, the Court stated, "A mere scintilla of evidence is not enough to require the submission of an issue to the jury".

Neither opportunity for fraud or undue influence, conjecture, nor suspicion can take the place of evidence. In *In re W. Koff's Appeal*, 15 Pa. 281, 290, 53 Am. Dec. 597, the hearing judge stated:

> Doubtless there was ample opportunity for perpetration of fraud by Frank D. Behring, and there may be ground for considerable conjecture and suspicion, but as was said by Henderson, J., in Wanamaker's Estate, 8 Pa. Dist. & Co. R., 569, pages 76 '. . . opportunity is not evidence, and conjecture and suspicion do not take the place of testimony . . .' The Court quoted with approval the hearing

> Judge that the evidence would not support a finding by the jury of the codicil.

In *Thomas v. Kasco Mills, Inc.*, 218 F.2d 256 at 258, the court stated (C.A. 4):

> It is well settled that if the evidence as to a fact is so slight as to furnish only basis for a conjecture, the existence of the fact should not be submitted to the jury * * *.

In the instant case, appellant introduced no evidence of fraud or undue influence but relied entirely on opportunity and possibility. A jury could not properly have found fraud or undue influence. The district court properly held, therefore, that there was no evidence to meet appellant's burden of proof as to fraud or deceit or undue influence and properly directed a verdict in favor of caveatee on these issues.

A. The Issue of Fraud or Deceit.

Appellant's brief nowhere discusses the issue of fraud as a separate issue or points to evidence of fraud which would preclude a directed verdict on this issue. Although appellant's point I asserts that an offer of proof of fraud had been made, there is no reference to any point in the trial proceedings at which this offer was made and no reference to any such evidence.

In his opening statement, appellant's counsel made no reference to fraud and the district court stated that the issue was "not in the case anymore" (J.A. 26). Counsel admitted that he had "no direct evidence" of fraud on the part of the witnesses to the will but argued "we believe the circumstances are such that a jury could well infer from the circumstances that fraud was present" (J.A. 26). At the conclusion of appellant's case, before ruling on appellee's motion for a directed verdict, the Court requested appellant's counsel to address himself to the evidence introduced to show fraud or deceit (J.A. 62). Counsel's response was that "On the issue of fraud, Your Honor, it seems to me

she (appellee) had a fantastic amount of opportunity, for the draftsman of the will, whose testimony I think is questionable, and the beneficiary of the will, whose testimony I suggest is questionable, on a number of issues, particularly on the facts, I think the jury should be given the opportunity to see whether she truly did not know what was in that antenuptial agreement"; * * * (J.A. 62). In reply to the court's further inquiry whether this completed his discussion of fraud and deceit (J.A. 62), counsel stated, "Yes, sir" (J.A. 62).

Counsel made no other reference to evidence of fraud but argued that "where there is some evidence" of fraud or undue influence and if the will has not been read to an illiterate testator, "evidence must be adduced to show that he has read the will" at the time of its execution (App. Br. Point I). It is apparent that there was no evidence of fraud so that appellant's argument, even if a correct statement of the law, would be inapplicable. In any event, there was clear evidence testator knew the contents of the will (J.A. 60, 61). The direction of a verdict on the issue of fraud and deceit in these circumstances was clearly proper.

B. The Issue of Undue Influence.

To overcome the presumption of validity of testator's duly executed will with respect to this issue, appellant had the burden of establishing that the claimed influence destroyed testator's "free agency" or "that his will was overborn by excessive importunity, imposition or fraud so that the will does not, in fact, express his wishes as to the disposition of his property, but those of the persons exercising the influence". *MacKall v. MacKall,* 135 U.S. 167; *Conley v. Nailor,* 118 U.S. 127.

A showing of general influence over the testator, however strong or controlling, not brought to bear on the testamentary act, is not sufficient. *In re Schaefer Estate,* 207 Wis. 404, 241 N.W. 382; *MacKall v. MacKall,* 135 U.S. 167. Nor is "proof of mere opportunity to influence

the mind of the testator, even though coupled with an interest or a motive * * *. Influence to be undue within the meaning of the law, must be of such a character as to destroy the free agency of the testator and substitute the will of another person for his own. *In re Armstrong Estate,* 65 S.D. 233, 272 N.W. 799." *In Rowlands Estate,* 70 S.D. 419, 18 N.W. 2d 290, 292.

In the case of *In re Krafts Estate,* 374 P.2d 413 (S.C. Alaska), where there were allegations relating to the health and great weaknesses of the testator, the court made clear that undue influence requires proof of compulsion with respect to the terms of the will, stating:

> There is nothing here which indicates the existence of any undue influence. Appellant has failed to sustain her burden of proving that by reason of influence exercised by another, the testator was virtually compelled to make a will which he would not have made had he been left to the free exercise of his own judgment and wishes.

In *Brooke v. Barnes,* 61 App. D.C. 161, 162, 163, 58 F.2d 887, 889, in holding it was error to deny caveatee's motion for a directed verdict and reversing a judgment based on a jury verdict denying probate, this Court made clear that a "domineering character" is no evidence of the exercise of undue influence which must be based upon "substantial evidence" and not "a mere possibility of suspicion that undue influence may have been exerted." The Court stated there is some evidence as to the "domineering character of Mrs. Brooke, but no evidence that she exercised undue influence over anyone, including her mother. * * * It will be remembered that it is not influence, but undue influence that is charged, and is necessary to overthrow a will * * *." The Court continued: "At most, there is a mere possibility of suspicion that undue influence may have been exerted by Mrs. Brooke. This is not enough * * *. After all, the responsibility was hers [the testatrix'] and in the absence of substantial evidence of undue influence, her wishes as expressed in her will should and will be respected."

In appellant's argument that the issue of undue influence should have been submitted to the jury, the only factual matters to which she refers are some testimony that testator was enfeebled and senile at the time of the making of the will, that the draftsman and sole beneficiary had ample opportunity to exert an undue influence on the testator because they visited with one another before and after the will was executed and before it was filed for probate,[11] and that the provisions of the will manifested the result of undue influence. This influence was to be inferred from the fact that the will (1) increased the sole beneficiary's interest from $20,000, to which she would have been entitled under an antenuptial agreement, to in excess of $100,000, (2) provided for the testator's sole grandson by a request to the executrix to set aside the sum of $5,000 for his education, and (3) made no provision for the testator's sole child except the cancellation of a $1500 debt. (App. Br. 30, 31).

It is obvious that none of the "facts" upon which appellant relies constitute "substantial evidence" of undue influence. The law is clear, as previously shown, that in the absence of affirmative evidence that the exercise of influence had a bearing upon the provisions of the will, neither susceptibility to influence, opportunity and a disposition to exert influence, nor a disposition under the will of the testator's estate in an unusual way constitutes "substantial evidence" of undue influence.

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[11] This innuendo that a "continuing relationship" (App. Br. p. 14) existed between appellee and Mr. Long which provided an opportunity to exert an undue influence on the testator is without support in the testimony. Long responded in appellant's cross-examination as follows: That he (Long) had been many times at the home of Mr. and Mrs. Lapiana (J.A. 59), having known testator since about 1947, and that he had seen Mrs. Lapiana several times after testator died. "Q. Did you see her at your home? A. She's been over my house but I don't know when it was?" And he had seen her at her home. And they had had apparently one telephone call, after Mr. Lapiana died. Mr. Long had seen appellee at the funeral parlor (J.A. 59). This is the basis of appellant's suggestion of the possibility or a suspicion that there might have been an improper relationship which might have led to the imposition of undue influence.

Not only is there no evidence that the provisions of the will were the result of such influence, but the uncontradicted evidence shows that the will expressed the wishes of the testator free of any outside influence.

On the day before testator's son died, the attorney for his son's wife, the caveator, visited the testator to discuss a lot for the burial of his son. During this visit, the attorney suggested that because his son was adopted, testator should have a will drawn. This suggestion was made in the presence of testator and his wife. Following this suggestion, on the same day, testator's wife called his friend of many years, Long, a real estate broker, and requested him to come over to draft the will. Long came over and the testator's wife immediately departed leaving Long and the testator alone to prepare the will. Testator then advised Long of the manner in which he wished to dispose of his property. Long took notes, reviewed his notes with the testator, and then left to type on the will form he had purchased the directions he had received from the testator with respect to the disposition of his property. Long then returned to testator's home, read the will to him, and left it with him. Thereafter, on the same day, testator carried the will to the office of the Banks Realty Company where he announced that he had his will which he wanted Mrs. Banks and Long to witness. The will was then executed and attested in the manner previously described. Testator's wife was not present at any time after Long's arrival at the testator's home. There is no evidence that she even saw the will until two months after it was executed. (J.A. 52).

As the district court observed, there is nothing in the dispositive provisions of the will to suggest that it did not represent the free will of the testator or that it was the result of any undue influence. At the time the will was drawn, the son was known to be dying. The son's wife irritated the testator. The baby adopted by his dying son and appellant pleased testator and he requested that his executrix set aside $5,000 to be used towards the baby's education when and if he reached

the age of 18. He forgave a debt to his dying son. Since there was no other person with any possible expectation of inheritance, testator left his property to appellee who had for four years been his attentive and constant wife. As the trial judge said, "This is a perfectly natural, reasonable disposition of a man's estate. Certainly you can't infer any undue influence, any fraud or lack of mental capacity by the terms of the will." (J.A. 63).

The merit of appellant's claim that the district court should have permitted the issues to go to a jury is perhaps best illustrated by her argument that the testator's failure to provide in the will for his son clearly showed the result of undue influence (Appellant's Br. 28-29). As we have seen, the will was drafted on the suggestion of caveator's attorney because the son was expected to die immediately, and, in fact, died the day following the execution of the will.

Appellant did not present even a scintilla of evidence of fraud or undue influence and the district court properly directed a verdict on these issues.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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